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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 32

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA, AND ALBERT PHILLIPS, PETITIONERS,

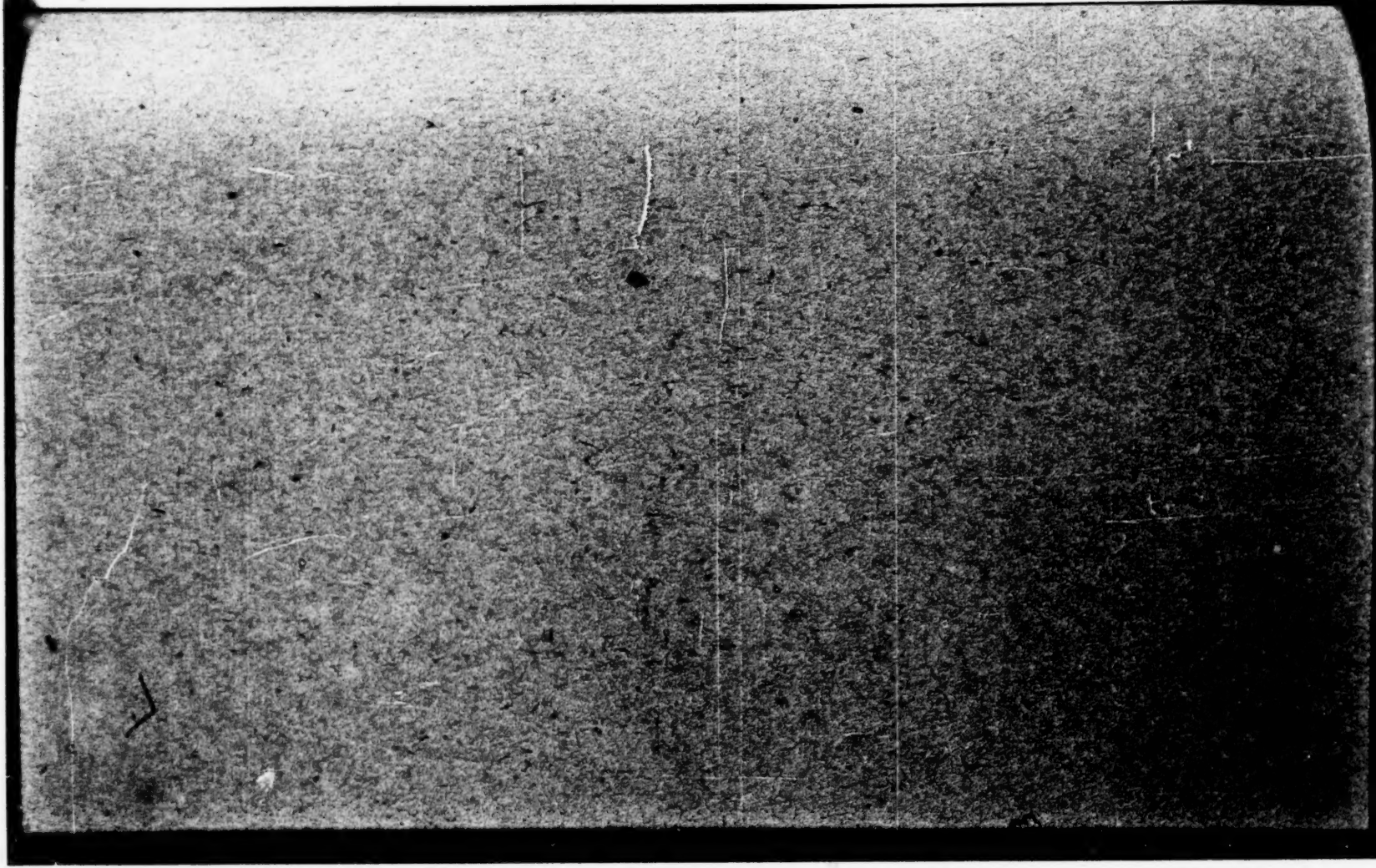
vs.

ELLA E. PINKSTON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 9, 1934

CERTIORARI GRANTED JUNE 4, 1934



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 32

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA, AND ALBERT PHILLIPS, PETITIONERS,

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 4017. Equity

ELLA E. PINKSTON, Plaintiff,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, David B. Robertson, Timothy Shea, Albert Phillips, Defendants

[fol. 2] BILL OF COMPLAINT—Filed Sept. 29, 1931

To the Honorable Judges of the District Court of the United States for the Northern District of Ohio, Eastern Division:

Complainant Ella E. Pinkston, suing on behalf of herself and on behalf of all other holders of so-called Widows' Pension Certificates hereinafter described, who have a common interest with her in the matters hereinafter described and are similarly situated, brings this her Bill of Complaint against the defendants and respectfully alleges:

1. That she is a citizen and resident of the State of Georgia; that defendant Brotherhood of Locomotive Firemen and Enginemen is an unincorporated voluntary organization and association of men employed as locomotive firemen and enginemen, having its headquarters and principal office and the headquarters and offices of all its departments at Cleveland, in the State of Ohio; that defendants David B. Robertson, Timothy Shea and Albert Phillips are citizens and residents of the County of Cuyahoga in said State of Ohio.

2. That the value of the matter in dispute herein as hereinafter shown is in excess of $3000.00, exclusive of interest and costs.

3. That defendants David B. Robertson, Timothy Shea and Albert Phillips are members of said Brotherhood of Locomotive Firemen and Enginemen and are the duly

elected, qualified and acting President, Assistant President and General Secreary-Treasurer, respectively, of said Brotherhood; that said defendants are sued as officers of said Brotherhood, as aforesaid, and as members representing the entire membership of said Brotherhood, all of whose members have a common interest in the matters hereinafter set forth and are too widely scattered and too numerous to be made parties defendant in this action.

4. That said Brotherhood of Locomotive Firemen and Enginemen prior to the times hereinafter mentioned and pursuant to action of its members and the provisions of the Constitution adopted by its members for its organization and management, established a department known as the Widows' Pension Department of said Brotherhood; that the object and purpose of said department was and has been to provide a monthly income for widows or widowed [fol. 3] mothers of deceased members; that the conduct and management of said department was by the Brotherhood and its members entrusted to and placed in the hands of the President, Assistant President and General Secretary and Treasurer of said Brotherhood; that the funds received by and in connection with said department were placed in a separate and distinct fund known as the Widows' Pension Fund in the custody of the General Secretary and Treasurer subject to disbursement upon check signed by said General Secretary and Treasurer and countersigned by the President or Assistant President; that by the provisions of the Constitution of said Brotherhood membership in said department was and has been confined exclusively to such members in good standing of said Brotherhood as were eligible under the rules governing the department; that the Constitution further provided that membership should be granted only upon application approved by said department, and that membership should continue only so long as each member might keep himself in good standing in said Brotherhood, and pay the assessments provided to be paid to said department by its members; that by said Constitution it was provided that upon proper proof of the death of a member of said Widows' Pension Department being furnished to the General Secretary and Treasurer and deceased having been a member for a period of two years, his widow or other designated beneficiary should be entitled to receive from the funds of said department a

pension of $35.00 per month during her lifetime, and as long as she should not remarry.

5. That Complainant is the widow of Thomas B. Pinkston, now deceased; (that Complainant has not remarried;)* that said Thomas B. Pinkston was in his lifetime and at the time of his decease, a member in good standing of said Brotherhood of Locomotive Firemen and Enginemen and of said Widows' Pension Department of said Brotherhood; that said decedent was admitted to membership in the Widows' Pension Department on the 18th day of March, 1927, had been a member thereof more than two years prior to his decease and in his lifetime paid all assessments required by the rules of said departments to be paid by him and observed all of the rules and requirements of said [fol. 4] department; that on or about the second day of January, 1929, said Brotherhood of Locomotive Firemen and Enginemen issued to said decedent its Widows' Pension Certificate, naming Complainant as the beneficiary thereunder and covenanting that in the event of the death of said Thomas B. Pinkston Complainant should be entitled to receive from the funds of the Widows' Pension Department the pension provided for in the Constitution of said Brotherhood of Locomotive Firemen and Enginemen and hereinabove described; that due proof of the death of said Thomas B. Pinkston on or about the — day of ——, 1930, was given by Complainant to defendants and that thereafter until on or about the first day of August, 1931, Complainant received from defendants the sum of $35.00 per month from the funds of said Widows' Pension Department.

6. That prior to August 1, 1931, Widows' Pension Certificates were issued by defendants to numerous members of said Brotherhood other than Thomas B. Pinkston, deceased, and numerous widows and widowed mothers of deceased members of said Widows' Pension Department were entitled to and were receiving the benefits provided by the Constitution of the Brotherhood to be paid to them from the funds of said Department.

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*Amendment by interlineation made Nov. 28, 1931, by leave of Court (West). John H. Schultz.

7. That on or about the 30th day of July, 1931, defendant Albert Phillips as General Secretary-Treasurer of said Brotherhood advised Complainant and other beneficiaries named in Widows' Pension Certificates issued as aforesaid, that the funds of said Widows' Pension Department and the prospective income of said department were insufficient to meet the expenditures of and the claims against said department; that by reason thereof the Brotherhood at its Convention assembled had decided and taken action to discontinue the department as of August 1, 1931, and that no payments of pension would be made from said fund to Complainant or others from and after August 1, 1931; that Complainant is informed and believes and so charges that the said Convention authorized the suspension and collection of all further dues and assessments payable by the various members to the said Widows' Pension Fund and authorized and directed the said Albert Phillips, General Secretary-Treasurer of said Brotherhood, to suspend paying further payments of said pensions and to settle with each of the pensioners similarly situated as your Complainant for whatever sum possible, not, however, to [fol. 5] exceed $1500.00, the residue of the said funds in the Widows' Pension Department to be then distributed among the members of said Widows' Pension Department holding unmatured certificates.

8. That defendants have at all times since August 1, 1931, failed and refused and now refuse to make the said payments of $35.00 per month to Complainant and the other beneficiaries of the funds of said Widows' Pension Department, as and in the manner provided by the terms of the Widows' Pension Certificates issued by defendants, and as provided by the Constitution of said Brotherhood with respect to said department.

9. That Complainant has been advised and believes that including Complainant there are approximately seventy widows and widowed mothers of deceased members of said Widows' Pension Department who as beneficiaries are entitled to receive from the funds of said department the sum of $35.00 per month during their lives and as long as they remain unmarried; that the right of said parties to receive said sums is a fixed and vested right and became such prior to the action of the Brotherhood attempting and

pretending to discontinue said department as of August 1, 1931; that the right of said beneficiaries is most valuable; that Complainant is forty years of age and has an expectancy of — years, and her said right, based upon commonly accepted mortality and annuity tables, had a net present value on August 1, 1931, in excess of $5,000.00; that the terms and conditions of said Widows' Pension Certificates and provisions of the Constitution of the Brotherhood relating thereto, have been ignored, breached and repudiated and the rights of Complainant and the other beneficiaries of said fund have been violated, as is herein set out.

10. That Complainant has been informed and believes said Widows' Pension Department of said Brotherhood has in its Widows' Pension Fund moneys and securities having a value in excess of $300,000.00; that said fund is in the control and custody of defendants David B. Robertson, Timothy Shea and Albert Phillips, and that said defendants are trustees thereof for Complainant and others in like position as beneficiaries thereof and for the members of said department; that Complainant and the other widows and widowed mothers of deceased members of said Widows' Pension Department holding matured certificates have in equity a right and interest in said fund prior to the right [fol. 6] and interest of all other persons whomsoever and a right to the prior payment of the sums accruing to them from said fund; that said fund is a trust fund and that the terms and conditions of said trust have been violated by the Trustees thereof; that said Widows' Pension Fund has been found by competent actuaries employed by said Brotherhood to be actuarially insolvent; that Complainant and other widows and widowed mothers of deceased members of said Widows' Pension Department are entitled to an accounting for and with respect to said fund by said Trustees and to the proper liquidation and administration of said fund and to the establishment and protection of their said right of priority therein.

11. That defendants David B. Robertson, Timothy Shea and Albert Phillips as Trustees of said fund have made disbursements from said fund not in accordance with the provisions of the Constitution of the Brotherhood relating to said fund and not in accordance with the terms and conditions of the Widows' Pension Certificates issued by de-

fendants in that said defendants wrongfully and without authority have made settlements on a lump sum basis with certain of the holders of said Widows' Pension Certificates and have wrongfully made disbursements from said fund of the amounts agreed upon by and in connection with such settlements; that said defendants threaten to make further settlements and disbursements; that such settlements and disbursements constitute an unlawful diversion of said fund from the purposes for which the same was created and placed in trust with said defendants; that said trust fund is being dissipated by said Trustees in violation of the rights of Complainant and the other beneficiaries thereof; that your Complainant is informed and believes and so charges that said defendants are about to further dissipate said trust fund by paying some $200,000.00 or more dollars to the living members of the Widows' Pension Department of said Brotherhood holding unmatured certificates. Complainant alleges that such unauthorized payments will operate to deplete and dissipate said trust and make it impossible for your Complainant and all other beneficiaries similarly situated to be paid their annuities as they accrue from time to time; that defendants are attempting to make settlement with all holders of matured certificates for less than the value of their respective rights in said fund, proposing and intending to thereby preserve a substantial portion of said fund for the living members [fol. 7] of said department whose claims have not matured and whose rights if any, in said fund are subordinate to the rights of Complainant and others in like position.

12. Complainant alleges that under the Constitution and By-Laws of the Brotherhood the funds of the said Widows' Pension Department are kept separate and apart from the funds of all departments of the said Brotherhood and claims for pensions arising against the said department in no way create any liability against the funds of any of the other departments. Complainant alleges, therefore, that if the said funds of said Widows' Pension Department are distributed among the living members of said department who hold unmatured certificates as is threatened and is about to be effected by the said officers of said Brotherhood, then the funds of the Widows' Pension Department will be thereby dissipated and there will be no source from which the annuities of your Complainant and the other benefici-

aries similarly situated can lawfully be paid, and your Complainant and such beneficiaries similarly situated will be left without adequate remedy at law and without proper remedy in the premises as their annuities mature from time to time, and they will suffer irreparable loss and damage unless a court of equity intervene and take charge of the said funds and fix the priorities therein as herein prayed for.

Wherefore, the premises considered, Complainant prays that the court grant a writ of subpoena to be directed to the said defendants, commanding them at a certain time therein to be named to appear and answer this Bill of Complaint, but not under oath, answer under oath being expressly waived, and to abide and perform such orders and decrees in the premises as seem conformable to the principles of equity.

Complainant prays that a trust in and of the said Widows' Pension Fund of the said Brotherhood of Locomotive Firemen and Enginemen be declared; that the defendants David B. Robertson, Timothy Shea and Albert Phillips be adjudged and declared to be Trustees thereof for Complainant and other widows and widowed mothers of deceased members who are beneficiaries of the said Widows' Pension Department; that said defendants David B. Robertson, Timothy Shea and Albert Phillips be required to account for and with respect to the funds of said Widows' Pension Fund in their custody and control and be enjoined [fol. 8] and restrained from making further disbursements from the said fund except under appropriate order of this court; that a receiver be appointed to take charge of, administer and liquidate said fund for the benefit of your Complainant and other beneficiaries in like position and the creditors of the said fund; that the court fix the priorities of the various claimants in and to the said fund and Complainant prays for such other and further relief as shall seem meet and proper and as the nature of the case may require.

W. L. Bryan, Smith, Hammond, Smith & Bloodworth, 509 Grand Bldg., Atlanta, Ga.; Garfield, Cross, MacGregor, Daoust & Baldwin, Cleveland, Ohio, Attorneys for Complainant.

Duly sworn to by W. L. Bryan. Jurat omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY INJUNCTION AND FOR APPOINTMENT OF A RECEIVER—Filed Sept. 30, 1931

Now comes the above named Complainant and upon the verified Bill of Complaint and the affidavits and documentary evidence filed therewith, moves the court for a temporary injunction restraining defendants David B. Robertson, Timothy Shea and Albert Phillips from making further disbursements from the Widows' Pension Fund described in the Bill of Complaint during the pendency of the above entitled action and that a Receiver be appointed herein to take charge of said fund and to preserve and protect the same during the pendency of this action, and to hold the same subject to the further orders of this court.

Smith, Hammond, Smith & Bloodworth; Garfield, Cross, MacGregor, Daoust & Baldwin, Solicitors for Complainant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING TEMPORARY INJUNCTION—Entered Oct. 5, 1931

This cause came on to be heard upon motion of Complainant for a temporary injunction and the appointment of a receiver herein upon the Bill of Complaint duly verified and filed, upon affidavits of Complainant and W. L. Bryan, each duly verified and filed herein on behalf of Complainant, upon the documentary evidence offered by Complainant and the testimony of defendant David B. Robertson, due notice of the filing of said motion and of the hearing having been given to defendants and their counsel, the matter was argued by counsel for Complainant and defendants and submitted to the court.

[fol. 10] Upon consideration whereof it appearing to the court from the proceedings of the last Convention of the Brotherhood of Locomotive Firemen and Enginemen and from the testimony of defendant David B. Robertson that the Widows' Pension Fund of said Brotherhood is insolvent and that the Brotherhood voted and decided to terminate as of August 1, 1931, all monthly payments from

said Fund to the parties holding matured Widows' Pension Certificates, the said Convention authorizing settlements with each of the holders of said certificates for sums not to exceed $1500.00, to be paid from said Fund and authorizing the distribution of the remainder of said Fund to the members of the Brotherhood having membership in said Widows' Pension Department and that the Convention made no provision for such holders of said certificates as might not agree upon settlements with the Brotherhood except that they be paid from the so-called Benevolent Fund if such payments were required by the laws of the various states, and it further appearing to the court that defendant officers of the Brotherhood propose to comply with the action of the Convention and that such distribution of said Fund, unless made with the consent of all holders of said matured Widows' Pension Certificates is in violation of the rights of the holders of such certificates and that no distribution should be made until the rights of the parties in and to said Fund have been fixed and determined.

It is therefore ordered, adjudged and decreed that the motion for a temporary injunction be and the same hereby is granted and the said defendants Brotherhood of Locomotive Firemen and Enginemen, David B. Robertson, Timothy Shea and Albert Phillips be and hereby are restrained and enjoined until further order of this court from making disbursements from said Widows' Pension Fund except as and in the manner authorized by the constitution of said Brotherhood and the terms and conditions of said Widows' Pension Certificates.

This order shall not preclude defendants from continuing negotiations with the holders of matured Widows' Pension Certificates looking toward a settlement of the rights of said parties in and to the Widows' Pension Fund, provided that the holders of said Certificates be notified in a manner to be approved by the court of their rights in the premises and be not notified that their rights in said Fund will be terminated in the event no settlement is agreed upon; it [fols. 11-13] being expressly ordered, however, that no further settlements shall be consummated or made from said Fund until further order of the court.

It is further ordered that Complainant's bond herein be and hereby is fixed at $500.00.

The motion in so far as it relates to the appointment of a receiver is overruled.

S. H. West, Judge.

Bond on injunction for $500.00, approved and filed Oct. 14, 1931, omitted in printing.

[fol. 14] In United States District Court

Defendants' Motion to Dismiss Bill of Complaint—Filed October 29, 1931

Now come the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated voluntary association, David B. Robertson, Timothy Shea and Albert Phillips, Defendants in the above entitled action and move the Court to dismiss the Bill of Complaint filed in the above entitled cause, upon grounds and reasons therefor, as follows:

I

Because it appears in the Complaint filed in this cause that there is a joinder of parties who, as a matter of law, ought not have been joined.

II

That the Bill of Complaint does not state facts sufficient to constitute a valid cause of action in equity against the defendants.

Thos. Stevenson, Attorney for Defendants.

[fol. 15] In United States District Court

Defendants' Application for Authority to Consummate Settlements—Filed Nov. 25, 1931

Come now the defendants in the above entitled cause and show to the court that heretofore, to-wit, on the 5th day of October, 1931, a certain order was made in this cause as follows:

"It is therefore ordered, adjudged and decreed that the motion for a temporary injunction be and the same hereby

is granted and the said defendants, Brotherhood of Locomotive Firemen and Enginemen, David B. Robertson, Timothy Shea and Albert Phillips be and hereby are restrained and enjoined until further order of this court from making disbursements from said Widows' Pension Fund except as and in the manner authorized by the constitution of said Brotherhood and the terms and conditions of said Widows' Pension Certificates.

"This order shall not preclude defendants from continuing negotiations with the holders of matured Widows' Pension Certificates looking toward a settlement of the rights of said parties in and to the Widows' Pension Fund, provided that the holders of said certificates be notified in a manner to be approved by the court of their rights in the premises and be not notified that their rights in said Fund will be terminated in the event no settlement is agreed upon; it being expressly ordered, however, that no further settlements shall be consummated or made from said Fund until further order of the Court."

Defendants further show to the court that at the time of the valuation of the Widows' Pension Department of the Brotherhood of Locomotive Firemen and Enginemen, in December, 1930, the assets were valued at $313,762.00. At that time there were 56 pensioners receiving benefits at the rate of $35.00 per month. The present value of those 56 pensions was placed at $327,079.00 by Sidney H. Pipe, Actuary of Toronto, Ontario, Canada.

Between the date of the above valuation and the action to discontinue the Department, the number of pensioners increased to 73 and, at the present time the total number of pensioners is 84.

Prior to the institution of this proceeding settlements had been consummated with 16 pensioners upon a lump [fol. 16] payment of $15.00 each. In addition thereto, about 50 pensioners had signified their willingness to accept settlement on the same basis. After the institution of this proceeding, all pensioners (including those who had already settled) were given another opportunity to consider the matter of settlement for $1500.00 in the light of additional information furnished them with the following results:

11 pensioners retained the $1500.00 already accepted.
22 widows have agreed to settle for $1500.00 each.

50 widows have failed to agree to the lump sum settlement and are being paid from the fund at the rate of $35.00 per month each.

1 widow, complainant herein, has rejected the tender of payments to her.

The present value of the securities and cash on hand in the Widows' Pension Fund is approximately $272,000.00. To consummate settlements with the 22 pensioners who have agreed to accept $1500.00 each will cost $33,000.00. This will leave a balance in the fund of approximately $239,000.00 with 51 pensioners on the Roll. While $239,000.00 is given as the market value of the securities and funds in the Department, the par value of the securities and funds, including $50,000.00 of Maricopa Bonds, is about $326,000.00.

Taking the present value of the funds in the Department at $272,000.00, with 73 pensioners on the fund at $35.00 per month each, there is an average amount to meet each claim of $3,726.00. If the 22 settlements are consummated, requiring the payment of $33,000.00, the remaining amount in the fund will be about $239,000.00. There will then be 51 remaining pensioners at $35.00 per month and an average amount to each claim of $4,686.00. The consummation of the 22 settlements already negotiated will enhance the value of the fund on hand for the paymtnt of remaining claims about $100,000.00, and enhance the average amount on hand for the remaining claims about $960.00.

Your petitioners respectfully pray for an Order of this Honorable Court authorizing the defendants to consummate the 22 settlements already negotiated by the payment to those claimants of $1500.00 each, a total of $33,000.00 and that, while continuing payments of $350.00 per month in accordance with the Widows' Pension Certificates and the [fol. 17] Constitution and laws of the organization, they may be authorized to negotiate and consummate further settlements on the basis of $1500.00 each whenever the opportunity presents itself.

Thos. Stevenson, Attorney for Defendants.

We acknowledge receipt of two copies of the within application this 25th day of November, 1931.

Garfield, Cross, MacGregor, Daoust & Baldwin, by
Kenneth H. Pauley, Attorneys for Complainant.

IN UNITED STATES DISTRICT COURT

RULING OF COURT ON MOTION TO DISMISS BILL OF COMPLAINT.—Entered Dec. 7, 1931

Dec. 7th, 1931. Overruled, with ex. to dfts. Supreme Tribe of Ben-Hur vs. Cauble, 255 U.·S. 356. The matter of priorities is the right of holders of matured claims, to which class pltff. belongs and for whose benefit the suit is brought, as against others not belonging to that class, to whom it is asserted payments from the fund are improperly proposed to be made. To claim such priority does not destroy the representative character of the suit. And it is entirely immaterial to the application of Rule 38 that the claims of those of plaintiff's class are "matured." If, as may be true, according to the bill, the trust fund may not be sufficient to satisfy all claims against it, the fact if it be so, that judgments might be recovered by individual claimants, does not stand in the way of a class suit to preserve the fund for the equal benefit of certificate holders. The point that pltff. may have remarried is covered by an amendment stating that she has not.

S. H. West, J.

[fol. 18] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION OF DEFENDANTS TO DISMISS THE BILL OF COMPLAINT.—Entered December 7, 1931

This day this cause came on to be heard on the motion of defendants to dismiss the bill of complaint filed in this cause, and was submitted to the Court; on consideration thereof the Court overruled said motion, to which ruling of the Court defendants by their attorney, except.

IN UNITED STATES DISTRICT COURT

ANSWER.—Filed Dec. 12, 1931

To the Honorable Judges of the District Court of the United States:

Now come the defendants the Brotherhood of Locomotive Firemen and Enginemen, David B. Robertson. Timothy

Shea and Albert Phillips and for their answer to the Bill of Complaint as amended say:

1. For lack of knowledge defendants deny that Complainant Ella E. Pinkston is a citizen and resident of the State of Georgia; they admit that the Brotherhood of Locomotive Firemen and Enginemen is an unincorporated voluntary association of men employed as locomotive firemen and enginemen having its headquarters and principal office and place of business at Cleveland, Ohio; that the defendants David B. Robertson and Timothy Shea are citizens and residents of Cuyahoga County, Ohio; but say that Albert Phillips is a citizen and resident of California.

2. The defendants deny the allegations of Paragraph 2 of the Bill of Complaint.

3. The defendants admit that David B. Robertson, Timothy Shea and Albert Phillips are members of the Brother- [fol. 19] hood of Locomotive Firemen and Enginemen and are the duly elected, qualified and acting President, Assistant President and General Secretary and Treasurer, of said Brotherhood respectively, but deny all other allegations contained in Paragraph 3 of the Bill of Complaint.

4. The defendants admit the allegations contained in Paragraph 4 of the Bill of Complaint.

5. Defendants admit that one Thomas B. Pinkston was at the time of his death a member in good standing in the defendant Brotherhood of Locomotive Fireman and Engineman and in the Widows' Pension Department of said Brotherhood; that said decedent had been a member of said Widows' Pension Department for more than two years prior to the date of his death; that a Widows' Pension Certificate was issued to said decedent in which Ella E. Pinkston was named as beneficiary; that due proof of the death of said Thomas B. Pinkston was made to the defendant Brotherhood; that $35.00 per month was paid to Ella E. Pinkston until about August 1, 1932, from the funds of the Widows' Pension Department, but for lack of knowledge deny that the complainant is the widow of said Thomas B. Pinkston, deceased and that complainant has not remarried since the death of said Thomas B. Pinkston.

6. The defendants admit that prior to August 1, 1931, Widows' Pension Certificates were issued by said Brother-

hood to numerous members of said Brotherhood other than Thomas B. Pinkston, deceased, and that numerous widows and widowed mothers of deceased members were being paid $35.00 per month from the funds of the Widows' Pension Department, but deny all the other allegations contained in Paragraph 6 of the Bill of Complaint.

7. Defendants admit that the Convention of the defendant Brotherhood assembled in June-July, 1931, authorized the suspension of collection of all further dues and assessments from members of the said Widows' Pension Department; admit that said Convention resolved that no payments of Pension would be made from said Widows' Pension Fund from and after August 1, 1931; admit that lump sum settlements with pensioners of said fund were authorized in an amount not to exceed $1500.00 and that any residue of the funds in the said Widows' Pension Department would [fol. 20] be distributed to the members of the Department, but deny all the other allegations of Paragraph 7 of the Bill of Complaint.

Further answering, defendants say that on or about the 30th day of July, 1931, the defendant Albert Phillips as General Secretary and Treasurer of said Brotherhood advised all those receiving payments from the Widows' Pension Fund that the income of the Department would not meet the expenditures or claims, present and prospective, of said Department and that by reason thereof the Brotherhood at its Convention had resolved to discontinue the Department as of August 1, 1931.

8. The defendants deny the allegations contained in Paragraph 8 of the Bill of Complaint.

9. The defendants admit that there are approximately 70 widows and widowed mothers of deceased members of said Widows' Pension Department who as beneficiaries would be entitled to receive from the funds of said Department the sum of $35.00 per month during their lives and as long as they remain unmarried; for lack of knowledge they deny that complainant is 40 years of age and has an expectancy of life as alleged in the Bill of Complaint and further deny all the other allegations of Paragraph 8 of the Bill of Complaint.

10. These defendants admit that there are securities and cash in the said Widows' Pension Department of the said

Brotherhood having a present value of approximately $270,000.00; they deny that said fund is in the control and custody of the defendants David B. Robertson, Timothy Shea and Albert Phillips; the defendants admit that said Widows' Pension Fund has been found by a competent actuary employed by said Brotherhood to be actuarially insolvent; but they deny the other allegations contained in Paragraph 10 of the Bill of Complaint.

11. The defendants deny the allegations contained in Paragraph 11 of the Bill of Complaint.

12. The defendants admit that under the Constitution of the defendant Brotherhood the funds of said Widows' Pension Department are kept separate and apart from the funds of all other Departments of said Brotherhood; they admit that claims for Pensions arising against said Department do not create a liability against the funds of the other Departments, but deny the other allegations contained in Paragraph 12 of the Bill of Complaint.

[fol. 21] 13. Further answering, the defendants deny that the other holders of Widows' Pension Certificates have a common interest with complainant in the matters described in the Bill of Complaint; they deny that the holders or beneficiaries of said Widows' Pension Certificates are similarly situated with said complainant, Ella E. Pinkston, or have a common interest with her; they therefore say that there is a joinder of parties plaintiff who as a matter of law ought not have been joined.

14. Further answering, the defendants say that the Convention of said Brotherhood of Locomotive Firemen and Enginemen assembled in Columbus, Ohio, in June and July, 1931, with respect to said Widows' Pension Department resolved substantially as follows:

(1) That the Widows' Pension Department be discontinued.

(2) That the International President and General Secretary and Treasurer of said Brotherhood be instructed to make lump sum settlements not to exceed $1500.00 with each widow and widowed mother now on the Widows' Pension Roll.

(3) That the monthly allowance payable to the widows and widowed mothers who declined to make a lump sum

settlement, be paid from the Benevolent Fund providing these monthly payments must continue under the insurance laws of the States.

(4) That the assets remaining in said Widows' Pension Department after the aforesaid settlements have been made be distributed to the members of the Department.

(5) That the aforesaid provisions with respect to said Widows' Pension Department should become effective August 1, 1931.

15. Defendants further say that, at the Convention of said Brotherhood in June and July, 1931, a new fund was established to be known as the Benevolent Fund. This fund was to be maintained by levying assessments on all members of the organization in the amount of 10¢ per month or such amounts as may be determined by the International President and General Secretary and Treasurer, and that it was from this fund that the monthly payments were to be made to widows and widowed mothers of members of the [fol. 22] Widows' Pension Department who declined to make settlement up to the amount of $1500.00.

16. Further answering these defendants say that subsequent to August 1, 1931, and prior to the institution of this action a communication was sent to each widow or widowed mother requesting information as to their ages, which was to form a basis of proposals for settlement; that upon receipt of such information a proposal to pay $1500.00, the full amount authorized by the Convention, in settlement of all claims was made to each widow or widowed mother; that in response to such offer 16 beneficiaries expressed their willingness to accept that amount and were paid the sum of $1500.00 and executed a full release and 34 additional beneficiaries agreed to accept that amount; that the plaintiff herein failed, neglected and refused to give the information requested and instituted this proceeding; that thereafter, upon authority of this Honorable Court more detailed information was sent to every beneficiary, whether a settlement had been accepted or not, and another opportunity was given to said beneficiaries to accept the sum of $1500.00 in settlement; that monthly

payments of $35.00 per month have been made or tendered up to date to all pensioners who have not accepted settlement, including complainant Ella E. Pinkston; that thereafter 11 of the beneficiaries who had accepted $1500.00 in settlement, reaffirmed said settlements, and 22 additional beneficiaries indicated their desire to accept the sum of $1500.00 in full settlement of all claims against the Widows' Pension Department under their Certificates.

Defendants further say that the present value of the securites and cash on hand in the Widows' Pension Fund is approximately $270,000.00; that to consummate settlements with the 22 pensioners who have agreed to accept $1500.00 each will cost $33,000.00; that the consummation of said settlements will leave a balance in the fund of approximately $237,000.00 with 51 pensioners on the Pension Roll; that if the settlements are not consummated there is an average amount on hand to meet each claim of approximately $3700.00; that if the 22 settlements are consummated there will be an average amount in the fund to meet each claim of about $4650.00 and that the consummation of the 22 settlements already negotiated will enhance the value of the fund on hand about $100,000.00 and enhance the average amount on hand for the remaining claims about $950.00 each.

[fol. 23] Defendants further say that both the present value of each claim and the amount on hand to meet the claim of each pensioner on the Pension Roll is greatly in excess of $1500; that the consummation of settlements with the pensioners on a basis of $1500.00 each does not deplete or impair the funds remaining to be applied to the remaining pensioners but that each and every such settlement enhances the remaining funds to the benefit of the remaining pensioners.

17. Further answering defendants say that the Constitution of the defendant Brotherhood provides as follows:

"Interpretation of Laws

"Purpose and by Whom Interpreted

"Sec. 1. (a) The provisions of this Constitution shall be interpreted and construed according to their most plain and obvious meaning, and to accomplish the purpose for which the Brotherhood was organized and is maintained.

"(b) Should any doubt arise as to the proper construction of any Section or rule thereof, it shall be referred to the International President, whose decision shall be final, unless modified or reversed by the ensuing Convention.

"(c) All interpretations rendered by the International President on the Articles in the Constitution, shall, unless rejected by the following Convention, be incorporated in the Constitution when codified."

Defendants further say that the Constitution of said defendant Brotherhood provides it shall be the duty of the International President to devote his entire time to the interests of the Brotherhood and have supervision over the organization in general; that acting under the foregoing authority and duty the defendant David B. Robertson, as President of he defendant Brotherhood, construed and interpreted the foregoing action of the Convention with repect to the Widows' Pension Department to mean, that no distribution of said funds of the Widows' Pension Department shall be made until the claim of every widow or widowed mother entitled to benefits under the said Widows' Pension Certificates shall have been satisfied and paid in full or provision made out of said funds to pay said claims in accordance with the terms of the Widows' Pension Certificates.

[fol. 24] Further answering defendants say they have made no payments from said Widows' Pension Fund wrongfully or without authority; that said defendants do not and have not threatened to make wrongful disbursements; that the settlements and disbursements heretofore made do not constitute an unlawful or wrongful diversion of said funds from the purposes for which the same was created; that said funds are not being dissipated by said defendants in violation of the rights of complainants and other beneficiaries thereof or otherwise; that the defendants are not about to dissipate said fund by paying out any amounts to the living members of the Widows' Pension Department holding unmatured Certificates or otherwise; that the payments heretofore made will not and have not operated to deplete and dissipate said trust or made it impossible for complainant or other beneficiaries to be paid their annuities but, on the other hand, say that the payments already made have made it more possible for the

complainant and other beneficiaries to be paid their annuities as they accrue.

Defendants further say they are attempting to make settlement with the holders of all matured Widows' Pension Certificates on the terms provided by the Convention as hereinbefore set forth, and intend to distribute any remaining portion of said fund, after all claims of matured Certificates have been satisfied and paid, to the living members of said Department who are still members of the organization; and show to the Court that such living members have an equitable right in the fund and in any balance of the fund which may remain.

Wherefore, having made full answer to all the matters and things complained of in the Bill of Complaint, defendants respectfully pray the Court that the Bill be dismissed and for judgment for their costs in this action incurred.

Thos. Stevenson, Attorney for Defendants.

Two copies of this answer were mailed to Garfield, Cross, MacGregor, Daoust and Baldwin, Counsel for complainant, this 12th day of December, 1931.

Harold C. Heiss, for Thomas Stevenson.

[fol. 25] IN UNITED STATES DISTRICT COURT

ORDER GRANTING COMPLAINANT LEAVE TO TAKE DEPOSITIONS —Entered Feb. 3, 1932

This day came the Complainant and filed herein her application for an order permitting and authorizing the taking of the testimony of Complainant and Lewis A. Irons and James R. Cothran, as witnesses for Complainant, by way of deposition before T. J. Freer, Notary Public, or before any other disinterested Notary Public as Commissioner, at the office of Smith, Hammond, Smith & Bloodworth, attorneys, 503-11 Grant Building, Atlanta, Georgia, commencing at 9:00 o'clock A. M., Central Standard Time on the 18th day of February, 1932, and in support of said application filed the affidavit of one of her attorneys, namely, John H. Schultz, and the said application, due notice of the filing of which was acknowledged by counsel for defendants, being submitted to the court.

It is ordered that the depositions of the above named witnesses may be taken before the officer and at the time and place above specified; that the taking of the testimony of said witnesses by deposition may be continued from day to day until the same is completed and that the said depositions may be filed herein on or before February 29, 1932.

IN UNITED STATES DISTRICT COURT

ORDER APPROVING NARRATIVE FORM BILL OF EXCEPTIONS—Entered October 24, 1932

Now comes the complainant and presents to the Court her bill of exceptions, in narrative form, taken on the trial of said cause, and the Court, upon consideration thereof, finds the same to be a true, correct and complete bill of exceptions, and the same is hereby allowed and signed and ordered to be filed as part of the record herein, this 24th day of October 1932.

[fol. 26] IN UNITED STATES DISTRICT COURT

ORDER APPROVING NARRATIVE FORM OF TESTIMONY—Entered October 28, 1932

Now comes the Complainant and presents to the court its certain narrative form of testimony taken at the trial of this cause which being found by the court to be true, is allowed, signed and sealed and is ordered to be filed in this cause.

IN UNITED STATES DISTRICT COURT

Plaintiff's Narrative Form Bill of Exceptions—Filed Oct. 24, 1932

Be It Remembered that on the trial of the above entitled cause in the District Court of the United States for the Northern District of Ohio, Eastern Division, at the April, 1932 term thereof, before Honorable Samuel H. West, a Judge of said court, the following proceedings were had:

APPEARANCES

For the plaintiff, John H. Schultz, Esq., of Messrs. Garfield, Cross, MacGregor, Daoust & Baldwin, and W. L. Bryan, Esq., of Messrs. Smith, Hammond, Smith & Bloodworth, of Atlanta, Ga. For the defendants, Thomas Stevenson, Esq.

Trial commenced June 9, 1930.

[fol. 27] OPENING STATEMENTS OF COUNSEL

Mr. Schultz: May it please the Court, the Court is familiar with this case, at least in a general way.

The Court: Well, I was at one time; I am not so familiar now. Are we going to take much testimony here today?

Mr. Schultz: If your Honor please, I doubt if we have to take any. I think most of the facts are before the court, and a re-tender of the evidence offered on the motion, with the depositions, I think, will be practically all.

This action relates to the Widows' Pension Fund of the Brotherhood of Locomotive Firemen and Enginemen. The action is brought by Ella Pinkston, a widow of a deceased member of the Brotherhood, who was also a member of the Pension Department, who had paid his dues and assessments in his life time. It is brought by her in her own behalf, and in the behalf of other beneficiaries in like position, to compel the observance and recognition of her rights and the rights of others in this Widows' Pension Fund, and to enjoin the defendants from carrying out their announced intention to divert the fund to purposes which we claim are improper under the trust arrangement in existence.

The Court: As I recall it, the fund was just to be divided up and paid back to those who had contributed to it.

Mr. Schultz: It is the action of the Brotherhood, taken at its 1931 convention, that this action relates to. It is the claim that that action taken by the Brotherhood was in violation of the rights of the beneficiaries. Now, that action was this: at their convention, the Brotherhood passed certain resolutions to the effect that those whose claim had matured against this fund, should be paid lump sums not to exceed $1500 in settlement of all their claims.

The Court: I recall it now.

Mr. Schultz: And that the balance of the fund after these settlements were consummated, should be paid over to the living members and those widows who refused to accept

said settlements should have their names erased from the pension roll and should receive no further payments.

We are prepared at this time to show that at the time the action was taken at the convention, certain members moved that payments to the widows be continued as long as the fund lasted, and those motions and resolutions were [fol. 28] defeated. On the other hand the convention took the action that if the widows didn't take the offer, the balance of the fund would go to the living members. Now, these widows claim that that action was in violation of their rights. The Brotherhood ceased making the payments to the widows, having notified the widows that no further payments would be made to them after August 1, 1930. They told them what the action of the convention had been and if they didn't make the settlement they would receive no further payments.

This action was brought early in October of last year. There had been no $35 payments in the meantime, and the Brotherhood having gone ahead with these settlements just as rapidly as they could, and having then consummated some sixteen settlements with widows on the basis of $1500——

The Court: There were about eighty widows on the roll?

Mr. Schultz: About eighty widows on the roll, and as the defendants represented on the hearing on the motion last fall, some fifty or sixty had expressed a willingness to accept the $1500. As the court found, however, they had not been notified of their rights, the payments to them had ceased, and they had been given the impression that if they didn't accept this settlement, they would get nothing.

Now, the action is in form, that is, the plaintiff's claim is that this is a trust fund; that the defendants are trustees of that fund; that the plaintiff and the other beneficiaries are the beneficiaries of that trust fund. The prayer is that a trust be adjudged and declared in this fund; that the defendants be declared trustees of the fund for the benefit of plaintiff, and the other beneficiaries; that the defendants be compelled by order of this court to administer the trust fund in accordance with the terms of the trust, observing the rights of the plaintiff and other beneficiaries; that the defendants be enjoined from carrying out the action of this convention, namely, be enjoined from refusing to make further payments, and be enjoined from turning the corpus of the fund over to the living members.

The Court: Do your pleadings, not your pleadings, but your real position at this time, contemplate objections to the settlements, voluntary settlements with these widows? As I recall, there was no objection made by you on the preliminary hearing, of any consequence, at least, to the officers making valuntary settlements, or settlements with the widows who wanted to settle and who were really ad-[fol. 29] vised of their rights. Is that still your position?

Mr. Schultz: I believe so, under the facts as we now have them. At that time we had no data as to the extent of the fund. We don't know now the ages of these widows, to whom they propose to make settlements, whether the settlements will give to the widows who are willing to make settlements, more than the annuity value of their rights in this fund or not. But according to the showing made by Mr. Stevenson on his application to have authority to consummate these settlements, it appeared that it would be to the benefit of the other fifty or more widows who were not settling, it would inure to their benefit if settlements be concluded. So far as full information was given to the widows with whom settlements were made, we couldn't see our way clear to object to it. But we do feel this way about it, that the defendants have no right to make settlements and involve the fund in any other way than that prescribed by the Constitution; but that this court, having taken jurisdiction of the fund, may authorize such settlement, if it results to the best interests of the other parties interested in the fund.

Now, the questions of law presented to this court have been submitted to the court, were briefed, were submitted orally on defendants' motion to dismiss the bill of complaint. That motion was based on the ground that this was not a proper class suit; that we didn't state a cause of action; that we weren't entitled to this equitable relief; the defendants' position being primarily that any cause of action we had was merely one at law to compel them to pay us from this fund. It was argued by the plaintiff that this would not give adequate relief; they were entitled to maintenance of the fund and the proper administration of it. It was then suggested, the parties being in this relationship, the only relief the plaintiff could have would be in a court of equity. At any rate, the motion to dismiss the bill was overruled, with a brief memorandum opinion by your

Honor. The facts in the case as I have related them here this morning, with one exception, were established at the hearing on the motion for temporary injunction. Since that time certain facts as to the state of the fund, as to the number of widows who are willing to make settlements, and who are unwilling to make settlements, have been submitted informally, and those facts can be stipulated and agreed upon between counsel, I know.

[fol. 30] The court will recall this, that after the order allowing a temporary injunction was made by this court—the court by that order enjoined the defendants from consummating further settlements, providing, however, that they might negotiate with the widows with a view to making further settlements, provided they gave them full information as to the fund—and that under that order certain letters, proposed letters to be addressed to the widows, were submitted by counsel to the court and approved, as I believe, by the court and sent out to the widows. In these letters the defendants have now advised the widows, as the court intimated they should do, that their rights to the $35 a month should continue; that these payments should continue whether or not they accepted the settlement. The defendants have also in those letters advised the beneficiaries that their rights were prior rights in the fund. So I believe there has been a recognition by the defendants of the rights of these plaintiffs, as I see it.

The Court: Well, you think there is not very much left?

Mr. Schultz: Nothing, except the matter of these settlements which we are not disposed to object to if the court considers them proper. The injunction, as we see it, should merely be made permanent; they should be enjoined from carrying out this action of the convention in violation of the widows' rights.

The Court: You think the court should go to the length of approving such settlements?

Mr. Schultz: I think the court might at this time approve the 22 settlements on the basis of $1500, and retain jurisdiction of the cause.

The Court: Were you implying the court would have to approve or disapprove further settlements as they may be consummated?

Mr. Schultz: I think there may be such a change in the status of this fund during the next year or two years that

the defendants will want to submit other propositions of settlement to the beneficiaries, and I think the court for that purpose should retain jurisdiction of the cause.

The Court: Do you wish to make a statement?

Mr. Stevenson: It is a little difficult for us to apprehend just what the position of the plaintiff is about these settlements, but she does not object to defendants making them provided the court approves them. Of course fundamentally, plaintiff does object about making the $1500 settle- [fol. 31] ments, because she doesn't know what effect it will have on the fund. We of course feel, first of all, that it is a matter of proof. The plaintiff should show that the court has jurisdiction, in that it comes within the $3,000 in bringing it to this court. There is only one plaintiff.

The Court: Well, the court has passed on that question.

Mr. Stevenson: The jurisdictional matter?

The Court: Necessarily, in refusing to dismiss the bill.

Mr. Stevenson: We didn't raise it.

The Court: It raises itself.

Mr. Stevenson: Now, with respect to the action of the convention, there is some bald language in the action and the proceedings of this convention, but those actions of the convention, as was shown by testimony here, are taken subject to other provisions of the Constitution of the Brotherhood and other actions of the convention. No individual thing stands by itself and we will show the testimony will show—we will introduce testimony to show, that that act of the convention that was taken with respect to this widows' pension fund was taken subject at all times to the right of the president, which is given by the same convention and has been continued within the constitution then and was reenacted into the ensuing constitution that he should interpret that law so as to abide with the laws of the United States and the various states, and that no action of this convention is binding upon the presiding official of the organization if in his judgment it violates any laws. It is a law-abiding institution, and these actions are taken subject to those provisions.

Another proposition: the plaintiff, the whole of their case is based on their allegation that these officers were about to dissipate the fund by paying out some $200,000 to living members who had no matured interest in the fund, in violation of the rights of the widows with matured certificates.

There may be some reason for making that, but there is no ground at all; nothing was done in violation; there is nothing in the action of the convention that orders that at any time the officers undertake to distribute anything or do anything looking towards distributing anything. The testimony will show that these officers never intended to do anything but to follow out the terms of the certificates, and it was the intention of the convention that every widow [fol. 32] should be paid in accordance with the terms of her contract. Under those circumstances we submit, under the authorities, and in justice, that there should be no injunction granted in this case, where these officers are simply going to fulfill the obligations as they have entered into them with these widows.

Mr. Schultz discusses the values of the fund. Now, your Honor, complainant at the time of the hearing had all the information with respect to the value of these funds, because the value of these funds was incorporated into the letters that Mr. Schultz discusses as having been prepared with the approval of the court, together with Mr. Schultz, and under the injunction of the court to get together and send out letters which would inform the widows, and we did inform the widows, we expect the evidence to show, of the value of the fund; and subsequent to that, twenty-two of these widows have asked for settlement of $1500.

The Court: Is that in addition?

Mr. Stevenson: 24 that are asking for their money in addition to those who elected to keep the money.

Mr. Schultz: How many returned it?

Mr. Stevenson: Five. There were sixteen had the money; five returned it, and eleven kept it; and out of the thirty odd that had asked for the money, twenty-four of them still want the money.

Now, of course, they have been discouraged, these ladies, widows of these railroad men, and they know all that goes on at the convention; a lot of them are visitors to the conventions, and they know just how the matters were handled by the men in convention. That particular language that is in this action of the convention with reference to the distribution of this fund, we will show that the man who presented that resolution made a speech in the convention, that it was the intention that all these widows should be paid in accordance with the terms of their agreement. There

was no intention whatever of that convention to defeat them, and they just made the alternative, they did make the alternative that was recognized that this widows' pension fund was insolvent, they couldn't pay them out, and they had established a new fund, a benevolent fund, and—you see, the widows' pension fund had only probably 7,000 members who belonged to the little widows' pension fund—the benevolent fund is applicable to every member of the Brotherhood, some eighty thousand. It was provided that if these widows weren't paid out of the widows' pension [fol. 33] fund, they would be paid out of the benevolent fund. The benevolent fund is open to assessment at the order of the officers of the Brotherhood. And in the convention the men were providing a better fund than the widows' pension fund to pay the pensions of these widows. There may be some question whether they can transfer the liability from the widows' pension fund to the benevolent fund. There is a question about that, but just to show the intention of the convention, the intention was that the widows should be paid, and they were even providing for them to be paid beyond the extent of these particular funds, if necessary. However, even though that was the real action of the convention, the fact is that these officers never intended to distribute or divert the widows' pension fund from the payment of the certificates, nor were they instructed to do so by the convention.

The Court: But you are forced to say that the widows' pension fund was insolvent.

Mr. Stevenson: Yes. But that should be taken as to exactly what we mean. The widows' pension fund was actuarially insolvent by virtue of the group of members, the number on the pension roll, and the small amount of assessments.

The Court: That is what makes any insurance fund insolvent.

Mr. Stevenson: That is quite right; but so that your Honor can have a view of the fund, when the convention discontinued the department and cut those seven thousand members out of the department, leaving only the widows to share in the fund, the fund was almost equal to the present value of all the claims, only about ten per cent below the present value. It would almost have paid out itself at $35 a month.

Now, under those conditions, we submit the case is moot; it cannot be shown that the defendants were going to do otherwise than comply with the contract. At any rate, there is the other feature, there could have been no irreparable damages that money would not compensate for. Money would have compensated for any damages at the worst, and this Brotherhood has in its general fund over a million dollars at any time, and if they had actually diverted this fund, they would have been liable on the general fund, and there could have been no irreparable injury.

Mr. Schultz: Just a brief statement in answer to one or two remarks of Mr. Stevenson. He said notwithstanding this action the convention took, these officers had no in- [fol. 34] tention to discontinue payments, notwithstanding the fact that the convention took the action which absolutely provided that the widows' names should be erased from the pension roll if they didn't take the settlement, notwithstanding the provision that the fund should be turned over to the living members, Mr. Stevenson says these officers had no intention to discontinue the payments. In answer to that we will offer the same evidence we offered on the motion. These officers at least notified the widows that they would receive no payments after August 1st; that no further payments were made to the widows after August 1st; and everything they did, as the evidence will show, was pursuant to this action of the convention. They went around just as far as they could, making the $1500 settlement, telling the widows they would receive no more money and giving them no more money and now saying their intention were something other than their actions.

In regard to this benevolent fund Mr. Stevenson has referred to the action of the convention was this: settlements up to $1500 may be made with the widows, and if they didn't settle, their names should be erased from the pension roll, and the surplus in the fund should be turned over to the living members with no further monthly payments to be made to the widows. If the Brotherhood be required to make such payments, by various State laws, they would be made out of the so-called benevolent fund in which the beneficiaries had no right whatever, because, as this court will recall, the constitution and the terms of the widows' pension certificates absolutely limit the rights of widows entitled to pension, to this fund.

The Court: You can take that all up later.

Plaintiff's Testimony

OFFERS IN EVIDENCE

Mr. Schultz: We will offer in evidence the Widows' Pension Certificate. It is already marked Plaintiff's Exhibit 1. It was offered in evidence at the hearing on the motion for temporary injunction.

We will offer in evidence a paper marked Plaintiff's Exhibit 2, which was offered.

The Court: Do you desire to stipulate the evidence that has already been offered as being again offered here or not?

Mr. Schultz: I think that might be done but I am merely re-tendering it.

[fol. 35] I am offering in evidence Plaintiff's Exhibit 2, letter dated July 30, 1931, from defendant Albert Phillips, Secretary-Treasurer, to Mrs. Ella E. Pinkston, which advises her that no further payments will be made by the Brotherhood after August 30, 1931.

Mr. Stevenson: We object to that, if the court please.

The Court: We might as well get the evidence in, at least.

Mr. Schultz: We are offering in evidence those provisions of the constitution of the Brotherhood of Locomotive Firemen and Enginemen which relate to the creation and maintenance of the widows' pension fund. These provisoins may be agreed upon by stipulation, may they not?

Mr. Stevenson: Yes.

(Such provisions of the constitution were thereafter marked and offered as Plaintiff's Exhibit 5.)

Mr. Schultz: We offer in evidence from the report of the Committee on the Constitution of the Brotherhood of Locomotive Firemen and Enginemen, made to the convention at Columbus, in June, 1930, those portions which appear on pages, Supplementary Report to the Committee, 22 and 23, which relate to the Widows' Pension Department and the liabilities of that department, and include the actuary's report as to the status of the fund and which we can have copied and later given to the reporter.

(Such portions of said report were thereafter marked and offered as Plaintiff's Exhibit 6.)

We wish to offer from the proceedings of the 32nd convention of the Brotherhood, which was held in Columbus, Ohio on June 8, 1931, those portions appearing on pages 719, 728, and 729, which cover the action taken with respect to the widows' pension fund. These portions of the minutes refer to the recommendations of the committee. They include the motion for the adoption of the recommendation of the committee. They include certain amendments that were proposed, including an amendment proposed by a delegate, E. L. Dwyer, that the funds in the department be paid in installments to the widows at the rate of $35 per month as far as the funds go which amendment was rejected, and which minutes include the final action of the convention, which I think need not be read.

[fol. 36] (Such portions of said proceedings were thereafter marked and offered as Plaintiff's Exhibit 7.)

We offer in evidence as Plaintiff's Exhibit 3 a marriage license of the plaintiff, Ella Pinkston, showing her marriage in 1918 to Thomas V. Pinkston.

We wish to offer in evidence without reading at this time, unless counsel desires it, deposition of Mrs. Pinkston, and the deposition of Mr. J. R. Cothran, an actuary of Atlanta, Georgia. Mrs. Pinkston's testimony merely related to the fact of her marriage, the fact of her husband's death, the fact that she has not remarried, her age, her residence, her receipt of this letter of July 30, 1931, and the fact that no subsequent payments of monthly installments were received by her. She does admit, however, that since the filing of this action certain $35 checks have been forwarded to her lawyers but not accepted by her.

The deposition of Mr. Cothran is merely to the fact that Mrs. Pinkston has an expectancy of some twenty-six years, and that the value of this annuity is something over $5,000.

The Court: It will be received.

Mr. Schultz: I think that is all.

Mr. Stevenson: I think the depositions, certainly of the actuary, should be read, as we wish to interpose an objection in the record. It does not bring to your Honor the information you want.

The Court: It will be received subject to your objection.

The depositions so offered on behalf of plaintiff and taken at 503 Grant Buiding, Atlanta, Georgia, on February

18, 1932, before Thomas J. Freer, Notary Public, pursuant to order for the taking of such depositions, were as follows:

Appearances: For the plaintiff, W. L. Bryan, Esq.; for the defendants, Harold C. Heiss, Esq.

MRS. ELLA E. PINKSTON, appearing as a witness in her own behalf, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Bryan:

My name is Mrs. Ella E. Pinkston. I reside at East Point, a suburb of Atlanta, in Fulton County, Georgia. I was born on March 3, 1890, and I was married to Mr. Pink- [fol. 37] ston on December 13, 1918, by J. E. Hephill, Pastor of Pryor Street Presbyterian Church at his residence on Pulliam Street, in the presence of his wife and another witness. I did not bring my marriage certificate with me but it is at my home. I resided continuously with my husband, living with him as his wife and holding myself out as his wife, from the date of our marriage until the date of his death. We lived at 311 South Harris, East Point, Georgia. My husband died on September 16, 1929 and I have not remarried and I am not going to.

After the death of Mr. Pinkston I furnished the Brotherhood of Locomotive Firemen & Enginemen with a proof of his death and thereafter the Brotherhood made monthly payments to me on my pension. The first payment was made on October 31, 1929 and $35 was paid each month up until July of 1930. They gave me no definite reason for stopping the payments but wrote me a letter and said that they had ceased. The letter I received is the letter which I transmitted to the court and which is now a part of the record in the case.

I haven't received any payments since that date except for the checks sent to my attorneys, and at the time of the filing of this suit the Brotherhood was behind in the payments from July 31st, 1931. The original pension certificate that was issued to me is the one which was sent to my attorneys in Cleveland and which is now a part of the record in this case.

Cross-examination.

By Mr. Heiss:

I have not gone through any marriage ceremony since the death of Thomas Pinkston in September, 1929, and have not applied for a marriage license in this county or elsewhere. I have not lived with any man since September 17, 1929.

I haven't seen the checks which were sent to my attorneys by the Brotherhood since August, 1931, and I can't tell you what months they are for. Mr. Bryan told me about the checks but they were not turned over to me and I do not have them. I have not received any money from the Brotherhood since the check of July 31, 1931.

I did not attend the convention of the Brotherhood in Cleveland in June and July of 1931, but I received a letter from Albert Phillips about the 2nd of August, 1931, with the last check which I received. I did not talk with any member of the Brotherhood or any delegate to the convention before that check arrived, but later I went to the secretary of the Local for advice. I went to Mr. Bell and I went [fol. 38] to Mr. Chasteen as a representative of the Brotherhood and they couldn't give me information so then I went to the Capitol, to Mr. Irons, who is Deputy Insurance Commissioner of Georgia. Mr. Irons sent me to Mr. Bryan and I consulted with him.

Mr. Chasteen and Mr. Bell said they didn't have anything to do with it and that it was out of their reach and that I would have to take it up with the Grand Lodge. They told me nothing whatever.

JAMES R. COTHRAN, a witness, called by plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Bryan:

My name is James R. Cothran. I reside at 901 Penn Avenue, Atlanta, Georgia, and I am a consulting actuary, at present engaged in actuarial work in connection with

the National Benefit and other companies. I am in charge of the National Benefit Life Insurance Company's business in the State of Georgia for the Receiver, who is the Deputy Insurance Commissioner.

I went to work in January, 1905, in the Actuarial Department of the State Mutual Life Insurance Company at Rome, Georgia, and have been continuously engaged in the insurance business since that time, with the exception of three and one-half years in the Army. I am an examiner for the State of Georgia and have frequently examined insurance companies in this and other states.

I am familiar with the mortality and annuity tables which are set forth in the Appendix to the Supreme Court Reports of Georgia, Volume 70, Page 843, etc.; the mortality tables being the Northampton Mortality Table, the Carlyle Mortality Table, and the Actuary's Mortality Table.

Examining these tables I will say that the expectancy of a woman who was born on March 3, 1890, the expectancy being calculated as of August 31, 1930, is twenty-seven and a fraction years. It is 27.61 at the even age of 40.

In the calculation of annuities, actuaries take the age as of the last birthday and if Mrs. Pinkston testified that she was born on March 3, 1890, her age on August 31, 1930 would be 40 years. Her expectancy as of that date would be 27.61 years.

Turning to the Annuity Tables, Actuary's Tables, which are based upon the Carlyle Mortality Tables, I will say that [fol. 39] the net present worth as of August 31, 1930 of an annuity of $35 per month, payable to a party having such an expectancy, during her entire lifetime, the annuity being calculated on a 6% interest basis, would be $5,040.84.

The Tables that I have referred to are accepted by the various insurance companies and insurance departments and fraternal orders in the calculation of annuities involving life expectancies.

Cross-examination.

By Mr. Heiss:

I have used the Carlyle Mortality Table in calculating the expectancy of a woman of the age of 40 and the Annuity Table which I used is the Carlyle Table, that is, the Annuity Table is based upon the Carlyle Table.

The figure of $5040.84 is the net present value of $35 per month of a person age 40, which was the age of Mrs. Pinkston on her last birthday on August 31, 1931.

Defining what I mean by net present value I would say that the net present value is what it would cost, or the lump sum that would be required to provide an income over a given period, or I will explain it this way: We will deposit $5040.84 in the bank or some institution that will yield 6% interest and from that interest and parts of the principal we can pay $35 per month during the balance of the life of the annuitant.

A slight variation in mortality tables is noted in different climates and in the sexes. At age 40 the variation in the expectancy would not be more than one year; women annuitants live longer than men, their expectancy is greater.

I am now acting as Agent for the Receiver of the National Benefit Life Insurance Company.

At the conclusion of the taking of such depositions it was stipulated and admitted by Mr. Heiss that Ella E. Pinkston was married to Thomas Pinkston on the date testified to by her.

The Court: It that all your testimony?

Mr. Schultz: That is the plaintiff's case.

The Court: Have you some testimony you wish to introduce, Mr. Stevenson?

Renewal of Motion to Dismiss

Mr. Stevenson: I would like to interpose a motion here. We renew our motion to dismiss on the failure of proof.

The Court: Your motion will be overruled. You may have your exception.

[fol. 40]

Defendants' Testimony

David B. Robertson, one of the defendants, offered himself as a witness, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Stevenson:

My name is David B. Robertson. I reside at Cleveland, Ohio, and I am President of the Brotherhood of Locomo-

tive Firemen and Enginemen. I have been president since July 1, 1922, and I presided at the last convention of the Brotherhood which was held at Columbus, Ohio, beginning in June. I have a copy of the proceedings of that convention and subject to the provisions of the constitution and state and federal laws the convention adopted the recommendation of the Committee with respect to the Widows' Pension Department appearing on page 719 and the portion at the bottom of page 728, and the amendments that were introduced. (Plaintiff's Exhibit 7.)

The provisions of the constitution or action of the convention to which I referred are these: Any subsequent actions of the convention that might follow on this or may have a bearing on it, or the provisions of the constitution which required that wherever any action, even if it is a modification or change in our own laws is found to be in conflict with state or federal laws, we have authority in the Brotherhood to change those things, and they are taken into account in applying any action of the convention.

Mr. Stevenson: We offer in evidence Defendants' Exhibit A, being a Constitution of the Brotherhood of Locomotive Firemen and Enginemen, in effect on and after January 1, 1932.

The Court: You can point out the provisions to which the witness has referred here.

Mr. Stevenson: I will refer to the specific provisions.

(Narrative continued:) The provisions that come under Article 19, "Constitution, How Amended"; also be involved under Article 20, "Interpretations of Law"; and also involved in Article 2, "Duties of the Grand Lodge Officers" which, taken together with the other two articles referred to, gives the International President authority to apply the laws of the Brotherhood, just as he may interpret them between conventions, and the applications of those laws have always been such as to adhere in every respect to any [fol. 41] state or federal law that we might find the convention action running counter to.

When I speak of Article 2, I refer to page 24 of the Constitution, Section 1, paragraph (b), as follows:

"He (the President) shall preside over Conventions of the Grand Lodge and at all times faithfully execute the laws of the organization; direct the Assistant President

and Vice Presidents in their work and have supervision over the Brotherhood of Locomotive Firemen and Enginemen's Magazine, and the organization in general. He may assign a Vice President to the Grand Lodge office, when, in his opinion, the work in the Grand Lodge office requires the services of a Vice President."

Article 20 on the matter of interpretation is on page 347 and is as follows:

"Sec. 1. (a) The provisions of this constitution shall be interpreted and construed according to their most plain and obvious meaning, and to accomplish the purpose for which the Brotherhood was organized and is maintained.

(b) Should any doubt arise as to the proper construction of any section or rule thereof, it shall be referred to the International President, whose decision shall be final, unless modified or reversed by the ensuing Convention.

(c) All interpretations rendered by the International President on the articles in the constitution, shall, unless rejected by the following Convention, be incorporated in the constitution when codified."

Referring to amendments to the constitution I refer to paragraphs (l), (m) and (n), page 346, as follows:

"(l) Should any emergency arise between Conventions as a result of the enactment of state or federal laws, on recommendation of the International President and General Secretary and Treasurer, the Board of Directors, acting in conjunction with the President and General Secretary and Treasurer, shall be empowered to amend any article, or articles of the constitution to conform to such laws, and same shall become effective at the discretion of the Board of Directors, the International President and General Secretary and Treasurer.

[fol. 42] (m) During a Convention, or as promptly thereafter as practicable, it shall be the duty of the Board of Directors to codify the laws as amended, changing language, or eliminating portions of the laws, so as to make all laws conform to the amendments adopted by the Convention; provided, no laws shall be omitted, or changed, by the Board of Directors, except it be evident that it was the desire of the Convention to so omit or change.

(n) When properly prepared in typewritten form by the Board of Directors, the amended constitution shall be referred to the International President, who shall prepare proper index, and have it printed."

Those provisions were all before the convention during the last session and were allowed to remain just as they are.

I probably made an interpretation of the action of the convention with respect to the Widows' Pension Department under the provisions of Article 20 but made no formal interpretation. We discussed it and agreed upon the procedure that was to be followed. I discussed the proceedings of the convention in respect to Widows' Pension Department with the General Secretary and Treasurer, the Board of Directors, and with counsel, as we generally find it necessary to do following each convention; so that in undertaking to apply a convention action, we would not find ourselves going in conflict with the laws of the States or the laws of the federal government, or we would not be finding ourselves in a position where we would be in conflict with contracts we had taken ourselves, without taking steps to protect us.

Since the action of the convention I did not do anything or instruct that anything be done to discontinue the payment of any of the widows. I have not made any arrangements or taken any steps looking toward the distribution of any portion of the Widows' Pension Fund other than by payments to widows, and I have not given any instructions or taken any steps with respect to having beneficiaries in the Widows' Pension Fund paid from the Benevolent Fund or from any other fund than the Widows' Pension Fund.

I have expressed myself to my associate officers as to what the convention meant by "insurance laws" when it used the expression "providing these allowances must continue under the insurance laws of the state."

[fol. 43] Q. What has been your position in your expression with respect to that?

Mr. Schultz: Objection.

The Court: That objection ought to be sustained. He can answer it so that it will be in the record. It is under-

stood this court does not think the testimony is competent. Another court might think it was.

A. I have counseled with my associates and have said to them that we will not undertake to distribute any of this fund, and that in so far as the action of the convention is concerned, we would first undertake to settle with these widows and if we could not settle with them, those that we could not settle with or were not willing to take the $1500, we would undertake to have the value of their annuities appraised and we would undertake to set aside, at least enough money to take care of them. I think that is what the convention contemplated, and I take that conclusion from the fact that an effort was made, as counsel for plaintiff has said, to interpose a motion that we should continue paying the $35 per month, but that motion, if carried, would have continued the widows' pension department itself, and that is the reason it was not adopted. The amendment that was finally adopted was a compromise of that action which provides for discontinuing the department, and on the other hand for making a settlement with those widows who were not willing to take $1500. That was a fireman's way of expressing it. In discussing it with counsel, I gave the best advice I could to my associates that we would settle with these widows before we would do anything else.

(Narrative continued:) The proposer of that amendment in introducing it, discussed it at length and with a thousand delegates in convention, it is sometimes necessary to leave, and that is why we followed the practice of interpreting a convention action after the convention was concluded. It is necessary to leave sometimes to interpret it so that it would be practicable. The mover of that amendment said that if these widows do not settle or do not care to settle for $1500, we have a condition here whereby we can continue to recognize our contracts, and that is what we expect to do.

It has been my intention to recognize the contract and to settle with those who will settle and those who will not, [fol. 44] pay them, as long as the fund remains or as long as the fund will support it.

I have had other occasions to proceed in a manner apparently contrary to the directions or resolutions of the convention. I have in mind an occasion in the 1925 Con-

vention which directed me to erect a building and I did not carry out the direction of the convention and erect the building. I made an investigation and when we convinced ourselves it was more beneficial to the Brotherhood not to erect the building we declined to carry out the convention action, reporting at the next convention our conclusion, and the next convention endorsed what we had done.

Our last convention established a new department known as the Benevolent Fund, to be built by assessments on all of the members. The assessments were fixed by the convention at a minimum of ten cents and the General Secretary and Treasurer and International President were given authority to raise them to whatever amount was necessary to maintain the fund to meet all payments upon them. About 80,000 members would be subject to such assessment in the Benevolent Fund and the assessment was ten cents per month per member.

Cross-examination.

By Mr. Schultz:

The copy of the constitution to which I referred in my testimony is the Constitution of the Brotherhood as revised and amended at our Columbus convention in 1931. The provisions that relate to the Widows' Penson Fund are not in the Constitution now. They are in the one prior to that. We are being governed by the Convention action.

Q. In other words, your present constitution, the constitution as you consider it now in force, contains no provisions with respect to the widows' pension fund; is that right?

A. Well, we are being governed by the convention action.

Q. And there are no provisions in this form of the constitution to which you have referred that pertain to the widows' pension fund or govern the conduct of you and the other officers in handling this widows' pension fund: is that right?

A. No, that is not right.

Q. Well, point out such provisions in the constitution.

A. There are no provisions in the constitution for widows' pension fund, but there are provisions governing my conduct with respect to dealing with action of the convention.

[fol. 45] The Court: Does the court understand by that answer that you mean that you think you have the right to disregard the action that seems to have been taken by the convention with respect to this widows' pension fund?

The Witness: No, sir.

The Court: What do you think you have the right to do—to interpret their action?

The Witness: Yes, sir.

The Court: Not to disregard it but to interpret it?

The Witness: That is it exactly.

The Court: How do you interpret the action of the convention omitting from its constitution any reference to the widows' pension fund?

A. I interpret it as meaning that as far as the Brotherhood is concerned, it desires to discontinue the department, but so far as taking care of the widows who are on the pay roll is concerned, the convention action is taken to mean we will continue to recognize our contract just as long as there is money enough in the fund to do it with, except in so far as those widows who are willing to sign a release and go off the payroll by accepting $1500.

(Narrative continued:) Prior to 1931 my duties and the duties of Mr. Shea and Mr. Phillips with respect to the Widows' Pension Fund were prescribed by the constitution. Under those provisions the General Secretary and Treasurer makes payments. The management and administration of the fund was covered by the provisions of the constitution which plaintiff offered in evidence and the contract which we had with the widows. The contract was in direct conformity with the constitution but the contracts are still there.

Q. It is your present interpretation of the action taken at Columbus that that action removed from the constitution all of those controlling provisions with respect to the widows' pension fund and by which you were guided prior to 1931: is that right?

A. I do not understand just what you mean by that; but if you accept this answer, I would say as far as the laws governing the widows' pension fund, the widows' pension department are concerned, they are no longer in the constitution, but I must recognize the fact that the Brotherhood has an obligation——

[fol. 46] Q. Just answer my question.

The Court: No; he may complete his answer.

A. But I must recognize the fact that I am obligated by the constitution that is still in effect to see that the contracts that this Brotherhood had with these widows are preserved unless they voluntarily accept $1500 in settlement.

(Narrative continued:) I do not know that under these contracts which I referred to, the rights of the widows are limited to the Widows' Pension Fund and made subject to the provisions of the constitution with respect to the Widows' Pension Fund. I am familiar with the provision in the certificate: "This Certificate is issued upon the express condition that the Constitution of said Brotherhood may be altered or amended at any time hereafter; that the member shall keep himself in good standing in said Brotherhood, pay his dues and assessments, and perform all other duties of membership which may be required by the Constitution of said Brotherhood; that the Constitution now in force, or as it may be hereafter altered or amended, is and shall be a part of this contract in the same manner and to the same extent as if said Constitution, or alterations or amendments thereto, were written herein; that all rights or claims hereunder shall attach only to the funds of the Widows' Pension Department and that no claim whatever, by reason of this certificate shall arise against any other fund of the Brotherhood of Locomotive Firemen and Enginemen." The Constitution itself, as in force prior to 1931, provided that the beneficiaries under the Widows' Pension Certificates should have no claim except against the Widows' Pension Fund and I recall this provision of the old constitution: "This department shall be self-sustaining; shall be entirely separate from all others; shall in no way create a financial liability for any other department."

I considered the attempted action taken at the Columbus convention in 1931 unlawful to this extent; in so far as State laws protected the contracts of these widows with our Brotherhood, we would not undertake to apply it except we got a voluntary agreement with the widow to take the settlement.

Q. You knew then that the action of the convention could not be carried out; that they had no right to take the action [fol. 47] which according to the minutes they went through the form of taking?

A. I don't know—no, at the time the convention took it I had my doubts, but before the convention left Columbus and before I left I was taking the matter up with my counsel.

Q. You knew they had no right to erase from the pension rolls the names of those who would not take the $1500?

A. I did not know it. I was no authority——

Q. You know that now?

A. Yes, sir.

Q. And you learned that afterward?

A. Yes.

Q. You knew that the action of the convention that declared the beneficiaries' names should be erased from the roll if they made no settlement, was unlawful?

A. I have been so advised.

Mr. Stevenson: I object.

The Court: No. The witness may answer.

A. No. I have been so advised; but I have been advised that if these widows are willing to take the $1500 settlement voluntarily, there is nothing to prevent us from doing it.

(Narrative continued:) I did not then know that the Brotherhood could not discontinue this fund and annul these provisions of the Constitution because we have had the experience of other organizations doing the very thing we are attempting to do and no question being raised. I did not know what our authority was as a matter of law. It is not true that it was after the filing of this action that I first decided that this action should not be carried out and that it was unlawful. After the convention I and the other officers proceeded to carry out the action of the convention in so far as we could legally. We eliminated from the constitution all provisions that related to the widows' pension department and on July 30, 1931, discontinued the $35 payments to the widows. I don't recall that we made no payments between July and October of 1931, some months after this action was filed. I don't just recall when payment was resumed but I know it was stopped. I think it is correct that we made no payments between July and the filing of this suit.

With respect to the $1500 settlements, we wrote the widows letters. We, of course, had to wait until we got their replies.

Q. And you advised them in this letter there would be no further payments after July 30, 1931?

A. No, we didn't say that. The letter is here and speaks for itself.

[fol. 48] Q. You advised them in the following words: "In order, however, to avoid hardship"—you advised them—"the action of the convention referred to above discontinued the widows' compensation department as of August 1, 1931. In order, however, to avoid hardships, and to give you an opportunity to furnish us with the foregoing information, the officers therefore have decided to send out checks in the usual way as of August 1, though the action of the convention terminates such payments thereafter." You did so advise them?

A. We told them what the convention action was.

Q. And in making these settlements, I think you testified on the hearing on motion for preliminary injunction, in making these sixteen settlements, you made prior to the filing of this action, you advised none of the widows that their payments of $35 per month would continue in the event they didn't make settlements; isn't that true?

A. I think our letter of September 23 answers that. I don't think we did.

(Narrative continued:) In our July 30th letter we made no mention of $1500 at all. We set out to get the ages of the widows so that we could estimate what the values of the pensions were, also what steps we might take to determine upon what basis we could settle with them. With reference to the letter of September 23 not being sent to Mrs. Pinkston I think when we were here last fall it had not been sent because this letter of September 23 was a reply to the answer we got from the widows. If we didn't get an answer we couldn't tell what we were going to do. Defendants' Exhibit 2, two pages, is the form of letter that was gotten out on or about September 23rd and that was sent to every widow that replied to our letter of July 30. That is my recollection. I think it is a fair statement to say that substantially all of the widows received this letter.

I do know that after the filing of this action and when sixteen widows who had consummated settlements and received their $1500 were advised that the $35 payments would continue, five of those sixteen widows withdrew from the settlement and returned their $1500.

At the time of the hearing on the temporary injunction approximately fifty or more widows had expressed a willingness to accept the settlement and since that time the number has shrunk to twenty-four in addition to the eleven.

A letter was sent out on October 21, after the Court action, and Mrs. Pinkston and the other widows who didn't answer our letter of July 30 were then notified that they [fol. 49] would continue to receive $35 per month if they made no settlement with the Brotherhood. It is my understanding that that letter was sent out after the action was started and after being submitted to the Court and that is when the first payments were made after the July payments.

I think in our September 23 letter in the language in the fourth paragraph, we meant to advise the widows that the payments would be resumed in case no settlement would be made.

I recall the motion made by Mr. Jones which appears in the minutes of the Convention, that the widows continue to receive their $35 per month and I recall that the Convention rejected that motion and I am familiar with the final action taken, namely, that the department be discontinued, that the President and General Secretary be instructed to make the lump sum settlement not to exceed $1500 with each widow now on the pension roll, that widows that refused to settle will have their names erased from the pension roll and will be paid their monthly allowance from the benevolent fund provided these allowances must continue under the insurance laws of the State.

I know that we do not operate under the state insurance law of Ohio. There are one or two states where we have to consider ourselves amenable to the state insurance laws in respect to a fund of this sort but we are not incorporated under the laws of Ohio. We do not report to the state insurance department.

Q. That is on the theory that you are not an insurance company, and that this is a trust fund distributed according to the Constitution and by-laws of your order; isn't that the theory on which you operate?

Mr. Stevenson: We object to that.
The Court: The court will hear that.

A. I don't know what the point of law is involved in it, but we are not incorporated under the laws of Ohio or any other state.

Q. I am not speaking about "incorporated." You make no reports to the insurance commission of Ohio, do you?

A. No, sir.

The Court: Ask him why.

Q. Why don't you? Do you know?

A. Well, the only reason I could give is that we are not required to because we are not incorporated or under the laws of the state. We never have been required to make those.

[fol. 50] Redirect examination.

By Mr. Stevenson:

Mr. Shea, the Vice President, does not have anything to do with the widows' pension department. The President has supervision over the department and the General Secretary and Treasurer administers it.

Mr. Schultz: Who constituted the pension board?

Q. Who constituted the pension board, do you recall?

Mr. Schultz: Page 123.

A. There is a pension board in the men's department, and we don't have any in the widows' pension department.

Mr. Schultz: Look at Section 3 on page 137. Will you read Section 3 of Article 12?

The Witness: "The President, Assistant President, General Secretary and Treasurer shall have as part of their duties the conduct and management of this department. They shall appropriate such amounts of money as in their best judgment shall best promote the interests of and maintain this department."

(Narrative continued:) The Assistant President is nowhere else mentioned in connection with the department. The General Secretary and Treasurer has conducted the correspondence since the Convention with the widows, although I have known and approved of it at the time. It is a fact that the Convention made or undertook to make this

action in discontinuing the widows' pension department effective August 1, 1931. We did send out checks on that date out of the widows' pension fund.

Thereupon, to maintain the issues upon their part, ALBERT PHILLIPS, one of the defendants, offered himself as a witness, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Stevenson:

My name is Albert Phillips and I am General Secretary and Treasurer of The Brotherhood of Locomotive Firemen and Enginemen. I became such General Secretary and Treasurer in July, 1931, less than a year ago. At the time [fol. 51] of our last Convention and on June 30, 1931 there was $370 576.85 in the funds of the widows' pension department.

Q. Now can you state the amount of cash and securities that were in the general fund of the Brotherhood at that time?

Mr. Schultz: Objection.
The Court: Overruled.
Mr. Schultz: Exception.

A. As of the same date, June 30, 1931, the total assets of the general fund, cash and bonds, aggregated $2,062,-028.46.

(Narrative continued.) As of May 31, 1932, the amount in the general fund is $1,346,754.39. At the last Convention of the Brotherhood in June and July of 1931 I was acting General Secretary-Treasurer and was on the platform at all times during the Convention. I was present when the committee's report, which has been read in evidence here, Plaintiff's Exhibit 7, was presented and passed. I recall Delegate Hanson offering the amendment that the International President, Secretary and Treasurer be instructed to make lump sum settlements, Plaintiff's Exhibit 7, and I recall his discussion with respect to that amendment that he offered. It was offered, as he explained, as a compromise

amendment, or a substitute for some previous amendment, one at least of which was then pending, the purpose in offering it being explained as an amendment which would enable the officers of the organization to carry out the apparent will of the convention, and do no injustice to any of the eighty or more widows then receiving pension benefits. In his explanation, the statement was made, as I now remember it, that there were perhaps other widows whose husbands were very recently deceased, who would be entitled to pension benefits under the then existing widows' pension law, and he desired to know if the amendment he offered was enacted, adopted by the convention, if provision would be made to also take care of those widows, if any, and stated as his purpose that he felt they should be provided for the same as those who were already receiving a benefit. And his plain purpose, as stated by him, being that in discontinuing the widows' pension, which appeared to be the desire of the convention, all widows receiving pension and those entitled to pensions although not receiving them, would be provided for.

[fol. 52] As to whether I made any comment at the time with respect to the provision erasing the widows from the pension roll if they did not accept the settlement as provided for in the amendment, as Acting General Secretary-Treasurer, keeping the records of these amendments when made, coming to my hands, I was often asked to explain them, or I was even asked to place a legal construction on some, which of course, I did not presume to undertake, but in reply to a question asked by the maker of this particular motion, I stated to him that in my opinion if it were adopted, not only these widows who might have pending claims should be cared for, I expressed the belief that such an obligation rested upon the organization, but that all widows should be provided for from the fund before any distribution or any other disposition of the fund were undertaken. And I further stated—that was as near as I went to the legal opinion—though I had been asked for one—while I would not presume to pass upon a point of law, that the convention should fully understand that whatever action was taken there must in being put into effect, be applied in accordance with the state and federal laws of the United States generally.

I signed the letter of July 30 that went out to the widows. Prior to sending out that letter I had reached a conclusion

upon consulting counsel, with reference to taking the widows off the pension roll if they would not acept settlement. I had reached the conclusion, or reached the understanding that provision must be made for satisfactory or acceptable settlements with the widows who were drawing pensions; or that their allowance of $35 a month must continue so long as there was money in the fund or until they might remarry.

I have not taken any steps toward a distribution of any part of the fund in any way other than I have just expressed.

Defendants' Exhibit C is a copy of a letter dated September 10 which we sent to the widows, including Mrs. Pinkston, who had not replied to the letter of July 30. Later replies were received from the other six, but there is no reply of record from Mrs. Pinkston. According to our record we have replies from all of the beneficiaries of the fund except Mrs. Pinkston. The September 23 letter was sent to all widows who had made reply to our letter of July 30, including those to whom the follow up letter was sent on September 10. That letter was sent to all widows who had been re- [fol. 53] ceiving pension payments except Mrs. Pinkston and it would have been sent to her had she answered either the letter of July 30 or September 10.

According to the language adopted by the Convention, the action of the convention terminated the widows' pension department as of August 1, 1931, and checks were sent out on August 1, 1931. We did not send checks on September 1 because we hoped to have replies to our letter of July 30 and be in position to make an offer of settlement in accordance with the convention action within a reasonable time, within the month of August, 1931. In fact that was my hope, that if settlements were made, there would be no pensions due widows on September 1st. Your question, as I remember, was why they were not sent out on September 1. They weren't sent out because of the delay in getting in the replies and in order that we might when replies had all been received, determine which of the widows might indicate a willingness to accept settlements and which of the widows might decline and therefore we would have to resume the $35 a month pension payments. That question had not been determined on September 1.

The names of no widows were removed from the pension roll at any time until after our hearing, I think, in October, and eleven of the sixteen widows who had accepted the $1500 settlement expressed their willingness and desire to retain that settlement of $1500 in full settlement. And they then ceased to draw pensions and their names were removed from the roll. At no time previous were any names erased from the roll.

When I failed to send our checks on September 1, 1931, there was not any intention on my part to discontinue the monthly pension payments. I had been advised by counsel and had reached the understanding at that time that the pension payments must continue to the widows who declined to settle on any terms which might be accepted.

Since September 1 checks have been sent to the widows who were on the pension roll, including Mrs. Pinkston, excepting the ladies who eventually expressed their preference to retain the $1500 settlement and thereby waive all claims or release any interest they had in the widows' pension fund, and in sending out those checks to all of the widows on the pension roll, the back payments were made to cover the months of August and September, for which months the mailing of the checks had been delayed because of the mass of correspondence and delay in getting replies [fol. 54] to the letter which we had sent out in our efforts to settle.

None of the widows, except Mrs. Pinkston, have made any objection to accepting the checks and none of them have been sent back to me with the exception of Mrs. Pinkston.

The Court: Has she declined to receive her checks?

The Witness: It is my understanding they have not been cashed.

The Court: Have they been returned?

The Witness: I would have to consult my records.

The Court: All of these checks about which you are talking are for $35 a month?

The Witness: Yes, and including all the intervening months.

The Court: Of course, in addition to that you had made some settlements of $1500 and you have sent checks representing settlements?

The Witness: We have sent checks in full. We had settled with sixteen widows and we later gave them the option of withdrawing their acceptance upon return of the amount which had already been paid to them, and received $35 a month each month. Five of them did return the checks and they were paid the compensation for all the months.

The Court: But other settlements in addition to that have been made, too?

The Witness: None, because of the action taken, we felt, under the action taken by the court, without authority of the court or its approval.

The Court: I understood you to say you had settled with 24 and 11.

Mr. Stevenson: We have never been permitted to pay out the settlements. We have paid them the $35 a month.

The Witness: We have paid them the $35 a month.

The Court: Settlement has not been made. The court didn't understand that. I thought from what had been stated that settlements had been in fact made.

The Witness: We are prepared to make the settlements. They have expressed by letters from time to time not only their willingness but their anxiety to settle.

[fol. 55] Mr. Stevenson: May the record show that the last check actually received by Mrs. Pinkston was the check that accompanied the letter of July 30, 1931? That is dated August 1, 1931, since which time counsel has received checks for each succeeding month up to date?

Mr. Schultz: I would like to state that in the latter part of October, about a month after this case was pending, after the motion for temporary restraining order, you sent a check to me. And you sent a check each succeeding month to me for $35, which I have held for reasons which I have explained.

Mr. Stevenson: Will the record show we have sent them to you as attorney for Mrs. Pinkston? My letters show that I asked you to tender them.

Mr. Schultz: It is for the reason that you did make them in the form of a tender that I didn't see fit to cash them. They were of course sent to me as attorney for her.

Mr. Stevenson: And the last one she received was dated August 1, 1931,

Mr. Schultz: The last she received, according to her deposition was with the letter of July 30, 1931.

The Court: It is not necessary to take the time.

Mr. Stevenson: But the date of that check was testified to as July 30, 1931, and the date is August 1, 1931, because it is so pleaded.

The Court: Proceed to something else. The court is not going to spend much time on that.

Cross-examination of Albert Phillips.

By Mr. Schultz:

I did not say that I knew when this action was taken, that it would not hold water and that it was an improper action for the convention to take. When the action was taken I thought it was a perfectly proper action. When the action was taken it was my intention to carry out the instruction of the convention and to erase the widows' names from the pension roll who did not make the settlement, subject to other provisions of the constitution and the laws of the land. When this action was taken it was my intention to abide by the action and to erase the widows' names from the pension roll who would not make settlement subject to the laws of the land. The resolution itself [fol. 56] says that if the law requires such payments, they shall continue. It was my intention to carry that out. It was my understanding that the laws and the decisions of the courts, in substantially all of the States required that continuation of the payment of the pension where settlement could not be made, and it was not my intention to erase any names of any pensioners where they desired that the payments continue.

I did not know that it would be unlawful under the laws of the majority of the states to take such action as the convention provided for. I gave you my intent based upon my understanding and it was my intention to continue the payments where the laws required. I expected to be bound by the decision of the courts wherever settlement- were not made and the matter was carried to the courts. However, I believed that the spirit in which this action was taken by the convention and the manner in which we dealt with our members, being railroad people, workers, and the general and accepted belief and desire as expressed by the convention action, that we would be able to work out settlements with everybody and would have no lawsuits.

We believed that they would either receive the $1500 or such sum as we might be in position to offer them, or that if any declined to accept, they would agree to waive their rights against the then existing widows' pension fund and accept payment from the benevolent fund, as was provided by the resolution adopted by the convention. In a word, we believed we would be able to work it out without any court action or injunction whatever.

It was my intention to make such payments to those who did not make settlements, as the courts might require me to make where it would be taken into court, but I didn't believe it would be necessary to take it into court. I intended to continue the payments to every widow who declined settlement. It was my intention and understanding of the convention action that we would continue the payments even if the fund was exhausted, by going to the benevolent fund.

Q. Why, if you intended to continue these payments, did you in the July 30 letter tell the widows that no further payments would me made to them?

A. I do not think that language is in the letter.

Q. I am reading from this letter: "The action of the convention referred to above, discontinues the Widows' Pension Department as of August 1, 1931. In order, how- [fol. 57] ever, to avoid hardship and to give you an opportunity to furnish us with the foregoing information, the officers of the Brotherhood have decided to send out checks in the usual way, as of August 1st, though the action of the Convention terminates such payments thereafter." You did make such statement?

A. The letter makes the statement here. My understanding of the action of the convention to discontinue the fund—the letter does not say, however, that the payments may not be made thereafter, and I had no such intention, notwithstanding the letter.

(Narrative continued:) I have not testified that the fund at the time of the convention was such as to be practically the equivalent of the aggregate of the annuities that were payable to the widows. I presume that I then knew but I can't now recall the aggregate values of the annuities at the time of the convention. The report of the actuary to the convention stated that the annuities had a present value of about $348,000.

Replying to your question whether I knew that there was not much of a deficiency between the assets of the fund and the aggregate of the annuities, I hope you will permit me to say we were considering the entire subject of the widows' compensation fund and the entire fund was 5.1 per cent insolvent, based upon the assessments being collected and the amount in the fund. It was the intent of the convention that the amount in the fund would be used to make settlement with the widows who were drawing pensions and had matured claims, and if the funds were insufficient that the convention, recognizing its obligation as a Brotherhood owing to these widows and to the deceased members who had belonged to our organization, would go to another fund, and the entire organization, by assessment, would make up such amount as might be necessary to provide for these widows under the terms of their contract, unless they were willing to accept settlement. We felt that we were entirely within our rights in proposing a settlement to them on any legitimate basis.

I did not think we would be within our rights in turning the balance of the fund over to the living members until we had settled with the widows. At the time of the convention I was of the opinion that in time the payments would exhaust the fund. It would take some time, but I would not attempt to state it in years or in months or any other period.

[fol. 58] Q. You didn't have the opinion beyond that that the fund was practically sufficient to pay these widows their $35 a month during the remainder of their expectancy; you didn't have that opinion?

A. I don't think I had a fixed opinion on that, Mr. Schultz.

Q. Do you recall having advised these widows in this letter of July 30, as follows: "On account of the conditions and circumstances found to exist in connection with Widows' Pension Department of the Brotherhood of Locomotive Firemen and Enginemen, it was decided at the recent Thirty-Second Convention of the Brotherhood, held in Columbus, Ohio, June-July of this year, that it was both necessary and desirable the Department be discontinued."

A. I did so advise them. The letter so states.

Q. You further advised them as follows:

The Court: I think you are taking too much time reading the letters. Ask him what you want to get without reading the entire letter.

Mr. Schultz: I am trying to get——

The Court: He has told you he didn't have an opinion then as to just how long this fund was going to last.

Mr. Schultz: I was trying to get an explanation of his conduct, of his statement to the widows. I don't believe it is necessary. That is all.

The Court: The court would like to have you explain just what your present purpose is and the purpose of the organization with respect to the fund and its distribution, and the liabilities to these widows. What do you expect to do?

The Witness: Your Honor, your question indicates leniency, that is, latitude in permitting me to explain.

The Court: I just want to know what your present purpose is, how you propose to handle this situation.

The Witness: Our present purpose is to, if permitted, continue our efforts to make settlements with the widows, and if we succeed in negotiating acceptable settlements with any considerable numbers, and there are some few left, we will pay those remaining widows $35 a month from the fund so long as the fund may continue. And if the number is reduced to a small point, we will endeavor to have an ap-[fol. 59] praisal or an actuarial calculation made to determine the value of their interest or annuities and set aside from the fund, if sufficient amount remains, an amount necessary to fully protect them throughout their lives; that is, the widows with whom we have not negotiated settlement, and then,and not until then, if there is any remaining amount, distribute that among the living members who formerly were members of the fund or of the department and who contributed to the building up of the fund. May I add a word? I am sure you are interested, and our motives have been questioned here,—I don't think seriously,—but we are an organization of workers and workers' families, and all of these men who were in the widows' pension department, some seven thousand at the time we were in convention a year ago, had been in the department for varying periods of time, a little more than five years, because it only began January 1, 1926. These men had all paid into that found

with the expectation of making, and for the purpose of making provision for their widows, their dependents. After five years experience, upon actuarial study, we learned that the department could not continue on the rates of assessments being collected; that it was only 5.1 per cent solvent; that we could not pay the benefits we had promised. We had been too liberal, in other words, and promised too much, and collected too little. And while there was a considerable amount in the fund accumulated in the five year period, it was plain where the line of receipts and the line of expenditures would cross, and it was, and probably nobody could determine the time, but it was claimed that in time it could not endure. It was the thought of the convention, expressed through the delegates there assembled, that the courageous thing to do, the fraternal thing to do, was to settle with these widows, and if any amount was in the fund after making what might be termed a fair and reasonable, and to these widows, an acceptable settlement, that amount would be distributed among the seven thousand members still in the fund, or perhaps 6,500, many of whom were out of employment entirely and in want and had families and had wives who were not members and for whom money had been taken by way of the fund for many years. That was the desire of the convention, and that is what the officers tried to carry out.

[fol. 60] The Court: And not to contract any more obligations to any more widows. I never had quite understood what the view of the Brotherhood was in respect to that settlement.

The Witness: I will try to explain it to you. I will try to make it brief. The convention action terminated the department as of August 1, not with any intent of repudiating our contracts or obligations, but so that no more members could be admitted to the pension department. You will understand the widows didn't join; their husbands joined and paid the assessment. They became the beneficiaries in the event of death and only as widows. So we could not add more Brotherhood members to the department after August 1. We did feel, however, that these two widows to whom I have referred, or some to whom I have referred,—it was actually two,—as having pending claims, but the claims hadn't been placed on the roll, and their names should be added and their names were added, al-

though no other names. There was one other name, a lady who later became a widow—we added her name in there. She became a widow subsequent to August 1.

The Court: Is that the only one?

The Witness: The only one in the whole membership. We added her as a matter of fairness. She was a few days during the month of August after the pension discontinued, so that brings the total up to 84

The Court: On just what theory was it that you determined to refuse to add others?

The Witness: On the ground that the rates were inadequate and the department could not continue without increasing the assessments to an adequate rate which would be so burdensome as to drive the men out of the department. That was our theory.

The Court: But just how did you avoid the obligation, if there was an obligation, to take on these subsequent additional widows and let them participate in the fund that had already been raised?

The Witness: Well, these widows who were named as beneficiaries, had no right, only under condition, the condition being the death of the member or husband, who was a member. Now, the husband could only remain a member by paying his assessments. We discontinud the department and discontinued collecting assessments on August 1. [fol. 61] We had no protest from any member. They recognized that it had to be discontinued, although we did include one woman because her husband had died a few days after August 1; we took care of her, although we didn't feel that we were obligated to do so, except some feeling of fair dealing.

The Court: I suppose some feeling of charity; nobody is making any complaint about that.

The Witness: We gave her the benefit of the doubt.

(Narrative continued:) I did know that the right of these widows to receive the benefits was a prior right in the fund ahead of the living members. It is not true that these widows were all comparatively young. The requirement that no one could become a member of the Department who was over 46 years of age applied to the husbands and not to the widows. A special dispensation was granted to ages up to 60 and many men came in up to 60. I never com-

piled the average age of the widows who were participating in the fund.

I do not have a list of the widows with their ages as requested by the interrogatory attached to the bill of complaint. It is my recollection that their ages range between 25 and 60 or 61.

I consider it fair and proper to propose to give these widows $1500 or approximately $120,000 in the aggregate and turn over the balance of the fund in excess of $200,000 to the living members whose rights in the fund were inferior. I consider that the widows who should receive such benefits received far more than the others who paid in the same sum. Notwithstanding from the report of the actuary that the value of these widows' annuities was over $327,000, and notwithstanding that these annuities were a prior right in the fund which exceeded $300,000, I considered it fair to ask them to take $115,000 or $120,000 because those widows would receive between $2,000 and $2,500 benefits for a payment by their deceased husbands of an average assessment of $70; and the other men who had paid the same average assessments, had wives who were not widows, and these men were out of work, had children, and any distribution, any money left for distribution after these widows had been paid from $2200 to $2400, their share would have been perhaps $30, taking the bonds and other securities at par. I thought the widow was getting all the best of the settlement, and that the officers of the organization were going much farther—I am [fol. 62] not undertaking to pass on the law—your question is addressed to me on fairness and propriety. I say it was both fair and more than fair.

The Court: What has this $2200 to do with it?

The Witness: They had received an average, these widows who had received an average of $740, and we were paying $1500 more; and my opinion is that that was more than fair to the widows from a brotherly viewpoint, and that is the point from which we viewed it, and I think most of the widows so felt and still so feel.

Q. I am handing you certain papers which I will have marked for identification Plaintiff's Exhibit 4, consisting of five sheets. That is your answer to the interrogatories?

Mr. Stevenson: It is a list of all the widows with their ages.

Mr. Schultz: In answer to the interrogatories?

Mr. Stevenson: Yes, in answer. I have told counsel one of these papers is merely repetition.

The Court: It may be put in evidence. Proceed.

(Narrative continued:) I did not prepare the papers forming part of that exhibit and they were not prepared under my supervision. They came evidently from the records in my office.

Mr. Schultz: We will offer that in evidence at any rate, as having been produced by opposing counsel.

The Court: It will be received.

Mr. Stevenson: We would like to offer in evidence the checks that went to Mrs. Pinkston, dated July 1, 1931, and August 1, 1931, and endorsed by her.

The Court: Is there any question about the receipt of the checks and the cashing?

Mr. Stevenson: If they just admit it, it is unnecessary to put them in.

The Court: They do admit it.

Mr. Schultz: Yes.

Mr. Stevenson: To make the record complete I would like to offer in evidence letters sent out by Mr. Phillips on October 21, to the widows who had already settled, and this was taken as agreed to between counsel after the first restraining order, and the letter of October 22, which went out to the widows who had not been paid.

[fol. 63] The Court: Very well.

Mr. Stevenson: Letter of October 21 is Exhibit D, and letter of October 22, Exhibit E.

Mr. Schultz: Are those all the letters that went out?

Mr. Stevenson: That is all.

Mr. Schultz: One further question.

(Narrative continued:) I can't distinctly recall that three or four days before this suit was filed Mr. Bryan called me on the telephone and said that he would like to talk with me concerning my intention with respect to these widows and these widows' pension fund. I can't remember any one calling and saying he represented Mrs. Pinkston and wanted to talk to me. I receive many telephone calls during the day. I can say definitely I did not tell him I was too busy to talk to him unless I was in confer-

ence. I do not recall talking to the gentleman whom you mention but I receive calls of course.

I do not recall having thereafter arranged to have Mr. Stevenson call him, but my opinion would be that if he stated he was an attorney wanting to confer on a claim, I would naturally and do every day say, "Well, I would prefer that you take that up with Mr. Stevenson, with my attorney," but I do not recall it in this particular case. I have so many conversations—I have other chores in addition to these, you know.

Thereupon the defendants called as a witness SIDNEY ARTHUR PIPE who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Stevenson:

(Narrative continued:) My name is Sidney Arthur Pipe. I reside at Toronto, Canada. My business is that of an actuary and I have been an actuary over 30 years. I am a Fellow of the Actuarial Society of America; a Fellow of the American Institute of Actuaries; and an Associate of the Institute of Actuaries of Great Britain. I have devoted my actuarial services to the problems connected with fraternal societies both in Canada and the United States. I have been working on those problems for about 30 years and am an ex-president of the Canadian Fraternal Association and the National Fraternal Congress of America which, at the time I was president, embraces about 9,000,000 fraternal members. I am an actuary of one of the largest of the international fraternal societies, having about 170,000 [fol. 64]members, and several of the smaller societies in Canada and the United States. The largest society is the Toronto. We are actuaries of the British Columbia government also.

On the instruction of the Brotherhood of Locomotive Firemen & Enginemen, I made a valuation of the liabilities of the Widows' Pension Department under its pension contracts, prior to the Brotherhood convention. From my investigation of the Department, the figure of solvency was 5.1%. That meant that they had $5.10 of assets for every

$100 of liabilities under their rates of assessment. That valuation was made as at the end of 1930. It was made in the spring of 1931 preparatory to the 1931 convention.

At the time of valuation, the Brotherhood advised me that the assets of the Widows' Pension Department on that date amounted to—$313,762. The liabilities on account of claims then being paid amounted to $327,079. Between that time and the time of the convention, July 1, 1931, there would be a change for the worse, because the premiums were inadequate for the benefits promised, and as time goes on under those circumstances the ratio of assets to liabilities decreases until the fund becomes not only actuarially insolvent but financially insolvent, that is, unable to pay its claims that have matured.

I have recently made an estimate of the value of the claims of the 11 widows with whom settlements were made on the basis of $1500 each. The present value of the 11 claims which were paid amounted to $66,377.

I have made a valuation of the claims of the 24 widows who have expressed their willingness to accept $1500 and the present value of those claims is $141,538.

With respect to the first group, the 11 widows, the highest value of any claim is $6389, being the claim of a widow of the age of 35. The lowest value of any of such claims is $5264, being the claim of a widow of the age of 51.

With respect to the 24 widows mentioned, the highest value of any claim is $6425, at the age of 32, and the lowest value of any claim is $4698 at the age of 56.

The Court: In making those figures, was account taken of the fact that liability disappears upon remarriage?

The Witness: Yes, sir.

The Court: Just what kind of table do you use in arriving at such a figure?

[fol. 65] The Witness: Some years ago there was a very extensive actuarial investigation made into the pension funds of the City of New York. Many of the benefits granted under their pension scheme contained benefits to widows which ceased when they remarried. And they consequently made an extensive investigation among their employees as to relative ages of husband and wife so that at the time the employee died we knew on the average what the average age of the widow was at the time of the em-

ployee's death. So that for example, if the employee was 50 years of age at death, you knew that the widow, on the average, would be, say 45 years of age; and you calculated your annuity or pension on that basis.

(Narrative continued:) If settlements were actually made with the 24 widows at $1,500 each instead of paying an allowance of $35 a month during the period provided in the certificate, the effect would be that the financial position of the remaining 49 who refused to settle would be improved by over $100,000, which is the difference between the $141,-538, which is the value of their annuities, and the settlement of $36,000, the difference of $105,000 odd, would represent the amount by which the position of the remaining 49 would be improved. The individual position of each of the 49 would be improved around about $2,000 apiece.

In investigating the Widows' Pension Department I made a study of the then rate of assessment being paid by the members of that Department, and a study of the rate that should have been charged to them to have a solvent Department. Roughly speaking, for example, from ages 18 to 30, the Brotherhood was charging $1 a month per member. The correct rate varied from $3.51 to $5 a month. That ratio existed throughout all ages, so that the members were only paying one-fourth of the rate that they should have paid for the benefits which were promised by the Department.

Cross-examination.

By Mr. Schultz:

Q. Mr. Pipe, assuming that Mrs. Pinkston was born in February of 1890, that her husband had died prior to August 1, 1931—assuming that she was born on March 3, 1890 and her husband died, as he did, prior to August 1, 1931, will you state what the value of this annuity was to her, what the value of her right to receive $35 a month so long as she remained unmarried, was, as of August 1, 1931?

[fol. 66] The Court: The court is not going to bother with two or three hundred dollars one way or the other. Just let's have the approximate figure.

Mr. Stevenson: I make an objection.

The Court: Objection overruled.

A. Age 41, that would be $6,000.

The Court: Have you any further testimony?

Mr. Stevenson: There is just one other point. Counsel asked about the present value of the fund in the department, whether there has been any change in the market since Mr. Newell made his appraisal back in October. He isn't here, but he gave me a memorandum which is initialed, which indicates that the market on the securities has declined; it is thirty or forty thousand dollars.

Mr. Schultz: If he were present, he would so testify. He doesn't have to prove that.

Mr. Stevenson: This is a notation he sent me, if I may read the notation. The funds of this Widows' Pension Department between October 10, 1931 to June 1, 1932, have declined 14.87 per cent. Then he says that the Dow-Jones 40-bond average comparison of the condition, indicates that the prices as of October 1, 1931 was 86.05, and on June 1, 1932, 66.30, a decline of 19.65 per cent; that with the Standard Statistics Company 60-bond average the percentage of decline is 21.65. His purpose was to show to your Honor that these securities have only declined 14.87, whereas the other two have declined up to as high as 21.65.

Mr. Schultz: Have you the amount of cash in the fund now?

Mr. Phillips: The cash as of June 1, $39,669.01.

Plaintiff's Rebuttal Testimony

John H. Schultz, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Bryan:

(Narrative continued:) My name is John H. Schultz. I am an attorney of Cleveland, Ohio, and one of the attorneys for the plaintiff in this case. I remember the occasion on which Mr. Bryan came to my office and called the office of Mr. Phillips, the secretary of the defendant. I know that Mr. Bryan and I did not go to Mr. Phillips' office. The rea- [fol. 67] son for not going to Mr. Phillips' office would be only hearsay, but I know that later in the day Mr. Bryan and I went to Mr. Stevenson's office and it was my under-

standing that that was either at Mr. Phillips' suggestion or that Mr. Stevenson called Mr. Bryan.

I remember the substance of our conversation with Mr. Stevenson with respect to the claim of Mrs. Pinkston for her pension. We introduced ourselves, told Mr. Stevenson whom we represented, namely, Mrs. Pinkston; stated that we wanted the facts as to the action of the convention taken at Columbus, and as to the status of the certificates of these various widows. I think Mr. Bryan related to Mr. Stevenson his telephone talk with Mr. Phillips, and as I recall, Mr. Bryan said that Mr. Phillips had been too busy to talk with him.

Mr. Stevenson produced the minutes of the convention and showed us just what the action of the convention had been with reference to the widows' pension fund. We asked him what the Brotherhood proposed to do. Mr. Stevenson said: "We are carrying out the action of the convention." I made some remark in the course of the talk to the effect that they couldn't do that, and Mr. Stevenson said: "Well, that remains to be seen." Nothing was said in that conversation concerning any intentions of the Brotherhood to make payments of $35 a month. That was never suggested to us and Mr. Steevnson made no offer of payment of the $35 which had matured at that time. No offer to pay the amount due was made until after the filing of the bill in this case. The latter part of October I received a letter from Mr. Stevenson forwarding a check for $35 and that was after the hearing on the application for a temporary restraining order and after the preliminary injunction had been granted.

Cross-examination:

By Mr. Stevenson:

I can't say that I made any request or formal demand for any money. I told you we were there to see what your intentions were with respect to Mrs. Pinkston. Our talk wasn't long—perhaps 20 or 30 minutes, as I recall. I don't recall that you told me at that time that a proposal or letter had gone forward to Mrs. Pinkston and that you were trying to get an answer. I don't recall any statement made by you that you didn't know whether she was living or dead or whether you had the right address or not.

[fol. 68] As we left your office, you may have asked what our intentions were. Mr. Bryan did not say to you that he would have to consult with his client and that he had no authority to proceed further without consulting his client. I don't believe any such answer was made, and I have quite a recollection that that answer was not made. My recoltion is this: that Mr. Bryan said, "We will have to talk this over and decide on what course we will pursue." You did not tell us that you were leaving for Washington that night.

Mr. Schultz: Nothing further on behalf of the plaintiff.

Renewal of Defendants' Motion for Verdict

Mr. Stevenson: Before the argument proceeds, may the record show the defendants renew their motion for a verdict?

The Court: Overruled.

Mr. Stevenson: Exception.

(Thereupon argument was had by counsel for the respective parties.)

The above and foregoing, together with the exhibits offered and received in evidence was all the evidence offered and received at the trial of the above entitled cause.

Thereafter the Court rendered its decision, which was in favor of the defendants and against the Complainant, dismissing the cause without prejudice at Complainant's costs, and judgment and decree were thereafter entered in accordance therewith, to which Complainant duly excepted; Complainant filing a motion for rehearing, which said motion, after due consideration by the Court was overruled on September 20, 1932.

Order Settling Bill of Exceptions

Now comes the Complainant and presents to the Court her Bill of Exceptions, in narrative form, taken on the trial of said cause, and the Court, upon consideration thereof, finds the same to be a true, correct and complete Bill of Exceptions, and the same is hereby allowed and signed and ordered to be filed as part of the record herein, this 24th day of October, 1932.

S. H. West, Judge.

Approved:

—— ——, Attorney for Defendants.

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[fol. 69] PLAINTIFF'S EXHIBIT No. 1

No. 621

Widows' Pension Certificate—Filed June 2, 1932

Brotherhood of Locomotive Firemen and Enginemen
Widows' Pension Certificate

Effective at 12 o'clock noon on the 2nd day of Jan., 1929.

Witnesseth That Thomas B. Pinkston who is a member of Lodge No. 247 of said Brotherhood, located in the city of Atlanta, State of Ga., being in good standing in the Brotherhood of Locomotive Firemen and Enginemen was on this 18th day of March, 1927, admitted to membership in the Widows' Pension Department of the Brotherhood of Locomotive Firemen and Enginemen, and as such member, in the event of his death Ella E. Pinkston (Widow) shall be entitled to the benefits set forth in such Widows' Pension Department, provided said member shall pay all dues and assessments required by the Constitution and By-Laws of the Order now in force or as may hereafter be altered or amended, that he shall in every other way comply with the By-Laws, rules and regulations of the Order and shall be in good standing in the Brotherhood.

This Certificate is expressly issued and based upon the written statements and answers made by the aforesaid member in his application for membership, and also in his application to the Widows' Pension Department, and the statements and answers made by him to the Medical Examiner set forth therein, all of which said statements and answers are hereby referred to and made a part hereof and are hereby ratified and warranted by said member to be correct and wholly true, and they shall form the basis of this contract of pension, and if said statements and answers are not thus correct and wholly true this certificate and policy shall be null and void.

This Certificate is issued upon the express condition that the Constitution of said Brotherhood may be altered or amended at any time hereafter; that the member shall keep himself in good standing in said Brotherhood, pay his dues and assessments, and perform all other duties of membership which may be required by the Constitution of said Brotherhood; that the Constitution now in force, or as it

[fol. 70] may be hereafter altered or amended, is and shall be a part of this contract in the same manner and to the same extent as if said Constitution, or alterations or amendments thereto, were wrtten herein; that all rights or claims hereunder shall attach only to the funds of the Widows' Pension Department and that no claim whatever, by reason of this certificate, shall arise against any other fund of the Brotherhood of Locomotive Firemen and Enginemen.

No benefits will be paid or due under this certificate until membership has been continued or assessments paid for a period of two years from the date hereof nor until necessary proof of the death of the member has been furnished as provided by the Constitution and By-Laws of said Brotherhood.

In witness whereof, the Brotherhood of Locomotive Firemen and Enginemen has caused this certificate to be signed by its President and General Secretary and Treasurer, and the seal thereof to be affixed hereon at the city of Cleveland, State of Ohio, on the hour and day aforesaid.

D. B. Robertson, President. A. H. Hawley, General Secretary and Treasurer. (Seal.)

Do not fill this blank form until change is desired.

Change of Beneficiary

I hereby certify that I am now a member of Lodge No. — of the Brotherhood of Locomotive Firemen and Enginemen, the same person to whom was issued the within Widows' Pension Certificate.

I hereby direct the cancellation of this Certificate, and that assessments shall cease upon same, and that the benefits arising therefrom shall no longer be payable as therein stated.

I hereby direct that in lieu of this Certificate a new Certificate be issued to me, and in the event of my death while said new Certificate is in force and effect I hereby direct that the benefits arising therefrom be payable to —— ——, related to me as (Widow) (Widowed mother).

—— ——. (Signature of Member:)

[fol. 71] State (or Province) of——,
County of ——, ss:

I, the undersigned, Notary Public in and for the County and State aforesaid, do hereby certify that—— ——, who

is known to me to be the same person who subscribed his name to the foregoing instrument, appeared before me this day in person and acknowledged that he signed and delivered the same as his free and voluntary act for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and notarial seal at ——, this — day of ——, A. D. 192-.

—— ——, Notary Public. My commission expires —— —, 192-. (Official Seal.)

A Notary Public should always be careful to attach his seal to the jurat of any affidavit sworn to before him, and in case of no seal being attached by any officer administering the foregoing oath, a certificate must be attached from some court of record having a seal, certifying that the officer administering the foregoing oath was duly qualified.

[fol. 72] PLAINTIFF'S EXHIBIT NO. 2

Letter, July 30, 1931, A. P. Phillips to Mrs. Ella Pinkston (2 Pages)—Filed June 2, 1932

Brotherhood of Locomotive Firemen and Enginemen,
Cleveland, Ohio

Albert Phillips, General Secy.-Treas.

July 30, 1931.

Mrs. Ella E. Pinkston, 247; 311 S. Harris St., East Point, Ga.

DEAR MRS. PINKSTON: On account of the conditions and circumstances found to exist in connection with Widows' Pension Department of the Brotherhood of Locomotive Firemen and Enginemen, it was decided at the recent Thirty-Second Convention of the Brotherhood, held in Columbus, Ohio, June-July of this year, that it was both necessary and desirable the Department be discontinued.

From an actuarial study of the funds on hand, the existing claims, the prospective income and prospective claims of the Department, it was made abundantly clear that the income would not meet the expenditures or claims, present and prospective, that to raise the assessments to an ade-

quate amount would be prohibitive, and that it would only be a question of time when the funds would be exhausted and payments would necessarily cease.

The Convention decided to face the situation squarely and before the funds were entirely exhausted, and before it became necessary to terminate payments without any notice, to you who have been receiving and are probably relying on them. To carry out this purpose, it was decided to make a lump sum settlement with each widow receiving payments, such settlement to be on the most equitable basis having in mind both the claim and the condition of the funds.

You will appreciate that the conditions are different in every individual case, largely dependent upon the age of the widow. To enable us to arrive at some equitable basis of making lump sum settlements, it will be necessary for [fol. 73] us to be furnished with the correct age of each widow and you are, therefore, urged to send proper proof of your age at the earliest possible date to A. Phillips, General Secretary and Treasurer, 418 Keith Building, Cleveland, Ohio. If it is possible to do so, you should furnish a certified copy of your birth certificate, or if that cannot be secured, certified copy of baptismal record; if neither of the foregoing are available, please submit certified copy of any family Bible entries or records, or any other documentary proof of birth.

The action of the Convention referred to above, discontinues the Widows' Pension Department as of August 1, 1931. In order, however, to avoid hardship and to give you an opportunity to furnish us with the foregoing information, the officers of the Brotherhood have decided to send out checks in the usual way, as of August 1st, though the action of the Convention terminates such payments thereafter.

Under the circumstances outlined herein you will appreciate the necessity and urgency of sending forward proof of your age at the earliest possible date in order that we will be in a position to take up the question of settlement. You can rest assured that as soon as you have furnished proof of your age, and any other information that may later be found necessary, a proposal for settlement, which we trust will meet with your entire satis-

faction, will be made as expeditiously as the circumstances will permit.

For your convenience in furnishing the above information, I enclose herewith addressed enveloupe for your reply.

Your very truly, A. Phillips, General Secretary-Treasurer.

AP:NMC.
Enc.

[fol. 74] PLAINTIFF'S EXHIBIT No. 3

Marriage License of Mr. Thomas Burke Pinkston and Mrs. Ella E. Brown—Filed June 2, 1932

Marriage License

STATE OF GEORGIA,
Fulton County:

To any Minister of the Gospel, Judge of the Superior Court, Justice of the Peace, or other person authorized to solemnize:

You are hereby authorized and permitted to join in the honorable state of Matrimony Mr. Thomas Burke Pinkston and Mrs. Ella E. Brown according to the Rites of your Church, provided there be no lawful cause to obstruct the same, according to the Constitution and Laws of this State; and for so doing this shall be your sufficient License.

Return this License, with Your Certificate, to my office for Record.

Given under my hand and seal, this 13 day of Dec., 1918.

Thos. H. Jeffries, Ordinary (L. S.)

I Hereby Certify, That Mr. Thomas Burke Pinkston and Mrs. Ella E. Brown were joined together in the Holy Bans of Matrimony, on the 13 day of Dec., 1918, by me.

J. Edwin Hemphill, M. G.

Ordinary's Office

STATE OF GEORGIA,
Fulton County, ss:

I, Claude C. Mason, Clerk of the Court of Ordinary of said County, do hereby Certify that I have compared the

foregoing copy of the Marriage License and Certificate of Marriage of Mr. Thomas Burke Pinkston and Mrs. Ella E. Brown with the original record thereof, now remaining in this office, and the same is a correct transcript therefrom, and of the whole of such original record, and that said Court is a Court of Record.

[fol. 75] In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court of Ordinary, this 28 day of May, 1932.

Claude C. Mason, Clerk Court of Ordinary. (Seal).

Ordinary's Office

STATE OF GEORGIA,
Fulton County, ss:

I, Thomas H. Jeffries, Ordinary of said County, and presiding Magistrate of the Court of Ordinary thereof, do hereby certify that the above attestation subscribed by, Claude C. Mason, as Clerk of said Court, is sufficient and in due form of law, and that his signature thereto is genuine.

Witness my hand and official signature, this 28 day of May, 1932.

Thos. H. Jeffries, Ordinary.

STATE OF GEORGIA,
Court of Ordinary,
County of Fulton, ss:

I, Claude C. Mason, Clerk of the Court of Ordinary of the County of Fulton, do hereby certify that Hon. Thomas H. Jeffries, whose name is subscribed to the preceding Certificate, is the presiding Magistrate of the Ordinary's Court of the County of Fulton; duly elected, sworn and qualified, and that the signature of said Magistrate to said Certificate is genuine.

Witness my hand and official signature this 28 day of May, 1932.

Claude C. Mason, Clerk of the Court of Ordinary.

[fol. 76] PLAINTIFF'S EXHIBIT No. 4

Widows and Ages of Beneficiaries [5 Sheets]—Filed June 2, 1932

Widows who expressed a willingness to accept our $1,500.00 settlement and to whom payments were made 16

Of the above, the following retained the $1,500.00 settlement 11

Name	Age
Helen B. Rider	35
Ruth Trumbo	35
Irene P. Taylor	36
Minnie A. McConnell	37
Katharine N. Heflin	39
Anna V. Koch	42
Elsie D. Bailey	44
Pearl W. Carroll	44
Nora A. Ingles	44
Nettie Ralenkotter	48
Florentine Brock	51

The following returned check for $1,430.00 and retained $70.00 for the months of August and September 5

Name	Age
Elizabeth Pitts	45
Louisa Stewart	46
Julia Sharretts	49
Mary T. Hawley	53
Lucy A. Thompson	61

[fol. 77] The following list comprises widows not willing to accept $1,500.00 settlement:

Name	Age
Thursa Akers	25
Mae Kline	29
Nita S. Kutzner	30
Nelia M. Twickler	30
Bertha L. Gerhard	32

Name	Age
Arizona V. Mehaffey	32
Albina Pearson	33
Helen E. Richie	33
Anna V. Nelson	34
Mabel Voytilla	35
Agnes L. Harris	35
Anna Hawley	36
Nellie M. Chumley	37
Jeanette Evans	38
Hilda H. Scarborough	38
Lelia K. Scanlon	38
Rachel S. Burns	39
Sophia A. Lewis	40
Bessie M. White	40
Ella A. Pinkston	40
Elizabeth S. Coffman	41
Vera C. McCann	42
Altina Buell	42
Ada L. Clifford	42
Anna B. Skiles	43
Mildred Harris	43
Bessie E. Miller	44
Bertie Way	45
Jennie Skelly	46
Alice T. Hamersly	46
Bessie Brandt	46
[fol. 78] Vena E. Cox	47
Agnes Nystrom	49
Ella F. Montgomery	49
Mabel C. Barr	60
Maggie Jacobs	50
Georgiana Shipe	50
Evelyn C. Branham	51
Fannie King	53
Mary E. Hennessy	54
Rosanna Dowd	60
Maggie Letsinger	61
Maggie E. Maher	61
Anna B. Barth	Age not given
Total number not willing to accept	44

The following list comprises widows willing to accept $1,500.00 settlement:

Name	Age
Marion E. Allbright	30
Elizabeth Sulzer	30
Frances A. Lawrence	32
Thoro H. Nelson	33
Virgie Plasschaert	33
Alta V. Worden	34
Elsie Burroughs	34
Alma B. Blackledge	36
Ethel Mae Shortill	37
Bessie L. Jacobs	38
Nellie L. Long	42
Cecilia Dill	42
Sadie Rafuse	43
Lucille A. Lang	45
Edith R. Scott	46
Margaret J. Cleminson	47
Mary E. Cleaver	48
May Lillian Hicks	49
Blanch Ragsdale	49
[fol. 79] Kathryn A. Boggs	50
Sadie M. Tennant	50
Marie A. Macdonald	52
Roberta Everton	52
Emma May Wheeler	56
Total willing to accept	24

The following list comprises widows who agreed to accept $1,500.00 and return certificate and release and then after letter of October 21st, changed their decision and expressed a desire to receive $35.00 monthly:

Name	Age
Mae Kline	29
Nita S. Kutzner	30
Nelia M. Twickler	30
Bertha L. Gerhard	32
Helen E. Richie	33
Mabel Voytilla	35
Agnes L. Harris	35
Anna Hawley	36
Jeanette Evans	38

Name	Age
Lelia K. Scanlon	38
Sophia A. Lewis	40
Bessie M. White	40
Vera C. McCann	42
Altina Buell	42
Anna B. Skiles	43
Mildred Harris	43
Bessie E. Brandt	46
Ella F. Montgomery	49
Mabel C. Barr	50
Georgiana Shipe	50
Evelyn C. Branham	51
Mary T. Hawley	53
Fannie King	53
Mary E. Hennessy	54
Maggie Letsinger	61
Lucy A. Thompson	61
Total	26

[fol. 80] PLAINTIFF'S EXHIBIT No. 5

Copy of Provisions of Constitution re Widows [3 Sheets]—Filed June 2, 1932

Provisions of the Constitution of Locomotive Firemen and Enginemen Pertaining to Widows' Pension Department —as in Force Prior to August 1, 1931

Article 12

Widows' Pension Department

Name

Sec. 1. A Department to be known as the Widows' Pension Department of the Brotherhood of Locomotive Firemen and Enginemen shall be maintained by the Grand Lodge. This Department shall be self-sustaining, shall be entirely separate from all others, and shall in no way create a financial liability for any other department. Effective January 1, 1926.

Object

Sec. 2. The object of this Department shall be to provide a monthly income for widows or widowed mothers of deceased members.

Duties of Officers

Sec. 3. (a) The President, Assistant President and General Secretary and Treasurer shall have as a part of their duties the conducting and managing of this Department. They shall prepare such forms of application, medical examination, Pension certificate, and reports, as in their judgment will best promote the interest of and maintain this Department.

President

(b) The President shall have supervision over this Department and approve disbursements of all funds; provided, the Board of Directors shall pass on appeal cases and their decision shall be final.

General Secretary and Treasurer

(c) The General Secretary and Treasurer shall keep a full, complete and separate account of all business of this [fol. 81] Department. He shall issue receipt for all moneys received, and make quarterly report of all receipts and expenditures, said report to be published in the Magazine February 1st, May 1st, August 1st and November 1st, of each year. He shall pass upon all applications for membership in this Department, and shall issue a certificate of membership to each applicant whose application for membership and medical examination *are* approved, which certificate shall be signed by the President and the General Secretary and Treasurer, with the seal of the Grand Lodge affixed.

Funds—How Disbursed

Sec. 4. Payment from the funds of this Department shall be made by check signed by the General Secretary and Treasurer and countersigned by the President or Assistant President.

Who May Participate

Sec. 5. Membership in this Department shall be confined exclusively to members of the Brotherhood of Loco-

motive Firemen and Enginemen (Married or single) who are in good standing at the time of making application and who are eligible as provided for in the laws governing this Department, provided:

(1) Any member who has been paid the amount of his beneficiary certificate will not be entitled to membership in the Widows' Pension Department.

(2) No application will be accepted from a member who has reached the age of forty-five (45) years.

(3) No member who is suffering from any sickness, or injury, can become a member until fully recovered from such sickness or injury.

Benefits

Sec. 11. (a) Upon proper proof of the death of a member of this Department being furnished to the General Secretary and Treasurer, and deceased having been a member for a period of two (2) years, his widow or other designated beneficiary, shall be entitled to receive from the funds of this Department a pension of thirty-five dollars ($35.00) per month during her lifetime, provided she does not remarry. Should she remarry, the payment of such pension shall cease.

[fol. 82] (b) A member, the head of a family, though not married, may take out the Widows' Pension and designate his mother to receive the benefits in event of the member's death, provided the mother is a widow and so long as she is unmarried. Should the member marry, during the time his widowed mother is named as beneficiary, he can then designate to whom he desires the pension paid in case of his death—either his widow or his widowed mother.

Assessments

Sec. 14. (a) Assessments of members holding membership in this Department will be graded according to age at entry. Monthly assessments for age at entry are as follows:

18 to 30	$1.00 monthly
30 to 40	1.50 monthly
40 to 50	2.25 monthly
50 to 60	3.50 monthly

Pension widows will not be required to pay dues.

Should the regular monthly assessments not be sufficient to meet the demands upon this Department the President and the General Secretary and Treasurer will have authority to levy additional assessments to meet such demands, a notice of such additional assessments to be forwarded to each member.

Asessments—Failure to Pay

Sec. 15. (b) Members who fail to pay assessments and become more than thirty (30) days in arrears, thereby forfeit their membership in this Department and can again become members only as new members and according to the laws governing same.

Assessments to Remain the Same

Sec. 16. Assessments of members in this Department shall remain the same as when they became members, except when the amount is increased or decreased by a Convention of the Grand Lodge.

[fol. 83] PLAINTIFF'S EXHIBIT NO. 6

Copy of Portions of Report of Committee on Constitution—Filed June 2, 1932

Copy of Report of Committee on Constitution, Made to the Thirty-second Convention of the Brotherhood of Locomotive Firemen and Enginemen, Held at Columbus in June and July of 1931, in so Far as Said Report Pertains to the Widows' Pension Department

"A careful study of the explanations of insurance principles given under the Beneficiary Department section of our report will assist in understanding the condition of the Widows' Pension Department.

It is safe to assume that if an unmarried man joins the Widows' Pension Department, he has a mother living. That is, all members of this department have living beneficiaries. If a member's beneficiary dies, he will in all probability drop his membership in the department, unless he contemplates remarriage.

Hence, the members leave the department by death (in which case a benefit is paid), or by withdrawal or expulsion. In this respect, the only difference between this department and the Beneficiary Department is that in this department claims are not paid on account of loss of limb or sight. The rates of expulsion are lower in this department because membership is voluntary and not compulsory.

The benefit payable on the death of a member is a pension of $35 a month to his widow, or mother. If the 'present value' of this pension, at the time of the member's death can be determined, the problem of determining the required monthly assessment for the benefit at each age at entry is no different from that of determining the assessment for a death benefit.

The 'present value' can be determined if we know the average ages of widows corresponding to the ages at the death of members, and we know the proportion of widows who remarry. This information is available from the records of Pension Funds. For example, if we know that the average age of the widows of members who die at age 40, is 36, then the value of the benefit in event of death at 40, is the present value of a pension of $420 per annum on the life of a woman aged 36, taking into account the chances [fol. 84] of remarriage. The benefit has a definite 'lump sum' value on the death of the member, this value varying with the age of the member at his death, instead of being a fixed amount as in the case of a beneficiary certificate.

A member entering the Widows' Pension Department at age 30 pays $1.00 a month. The 'lump sum' value of the benefit on the death of a member in this department does, at certain ages at death, reach $6,000. Compare this rate and this benefit with the rate of $1.10 paid in the Beneficiary Department for $1,000 of benefit.

Allowing 5% for expenses, the following are the rates of assessment which should be charged at certain ages for the widows' pension of $35 per month:

Age 20, $3.51; Age 25, $4.22; Age 30, $5.00;
Age 35, $5.98; Age 40, $7.16; Age 45, $8.67.

Liabilities

A valuation of the Liabilities of the department was made, in a manner similar to the method used in the Beneficiary Department.

There are pensions now being paid to widows, and the present value of these pensions at the date of valuation was $327,079.

The assets of the department on that date were valued at $313,762, so that there were almost sufficient assets to pay off the existing pensioners. That is, if these pensioners had been paid the value of their pensions. in one sum on the death of their husbands instead of being paid monthly at $35 per month, the department would have paid out all its assets in claims.

As in the case of the Beneficiary Department, the certificates of living members have to be protected by an adequate reserve so that the money, or securities, will be in the possession of the department to pay for their widows' pensions on their death.

Assuming that the present rates of assessment are continued, the amount of the reserve in cash or securities, which should be in the possession of the department, is $5,841,910.

At the date of valuation, the department possessed $5.10 of assets for every $100 of liabilities.

Reduced pensions, and pensions for a limited period, were examined, and the problem has been considered from all points of view in an endeavor to obtain a practical way of continuing the department.

[fol. 85] We are of the opinion:

(1) That the department should be abolished.

(2) That the assets of the department should be distributed to the members.

(3) That the method of distribution be to accumulate the assessments paid by each member at 4% per annum compounded annually, to obtain the total of these assessments and interest, and to return to each member a proportion of his total, equal to the proportion which the present assets of the department bears to the grand total of assessments and interest.

(4) That members who desire to provide their widows with a monthly income on death, do so by taking out a Mutual Insurance Department certificate, payable in monthly instalments at death, as explained in the Mutual Insurance Department section of our report.

The foregoing, as previously explained, represents the views of your Committee and call for changes and the elimination of several articles and sections in the present Constitution. Recommendations for changes of these different articles and sections are submitted in this Supplementary Report for your consideration under the respective articles and sections to be changed.

Committee on Constitution."

[fol. 86] PLAINTIFF'S EXHIBIT NO. 7

Copy of Portions of Minutes at Convention, 1931—Filed June 2, 1931

Minutes of Proceedings of the Thirty-second Convention of the Brotherhood of Locomotive Firemen and Enginemen, Held at Columbus, Ohio, in June and July, 1931, Pertaining to the Widows' Pension Department of Said Brotherhood

"Reports of Committees

Constitution

Article 12

Widows' Pension Department

Present Law

See Constitution for Present Law.

On Page 22 of this report, under caption "Widows' Pension Department," is the Committee's explanation of the report of the actuary covering his investigtaion of this department.

Recommendation of the Committee

After giving due consideration to the facts obtained as a result of the investigation and our study of the Widows' Pension Department, we submit for your consideration the following recommendations:

(1) That the Widows' Pension Department be discontinued.

(2) That the assets of the Department be distributed to the members.

(3) That the method of distribution be to accumulate the assessments paid by each member at four per cent per annum, compounded annually, to obtain a total of these assessments and interest, and return to each member a proportion of his total, equal to the proportion which the present assets of the Department bears to the grand total of assessments and interest.

(4) That members who desire to provide their widows with a monthly income on death, do so by taking out a Mutual Insurance Department certificate, payable in monthly installments at death, as explained in the Mutual Insurance Department section of our report.

[fol. 87] It was moved and seconded that the recommendation of the Committee be adopted.

Amendment by F. J. Aylmer, Delegate Lodge No. 145.
Seconded by E. E. Hinds, Delegate Lodge No. 146.
That assessments in Widows' Pension Department be increased 100 per cent until next Convention, said increase to be placed in a separate fund, then, if it is shown that this Widows' Pension Department cannot operate at that time, the increase in assessments be returned to the members paying the same in its entirety, and Department abolished or some other plan worked out for its operation.
Amendment rejected.

Amendment by W. J. Reardon, Delegate Lodge No. 338.
Seconded by H. E. Sympson, Delegate Lodge No. 337.
That the beneficiaries now receiving benefits from this Department will receive a payment in a lump sum of $1,000.00 as a paid up amount of their policy, balance of fund to be distributed among the members as stipulated in the Committee's report.

Amendment to the amendment by J. W. Jones, Delegate Lodge No. 744.
Seconded by T. S. Lee, Delegate Lodge No. 886, and C. D. Jobe, Delegate Lodge No. 764.

That we continue to pay the widows now on pension $35.00 a month as long as they live or remain single."

"Reports of Committees

Constitution

Amendment to the amendment rejected.

Amendment to the amendment by E. L. Bias, Delegate Lodge No. 102.

Seconded by O. F. Halldin, Delegate Lodge No. 103.

That the funds in this Department be divided between the widows and paid on the installment of $35.00 per month as far as the funds go.

Amendment to the amendment rejected.

[fol. 88] Amendment to the amendment by H. T. Hansen, Delegate Lodge No. 26.

Seconded by Carl Alexander, Delegate Lodge No. 23.

Amendment to Article 12:

That the International President and General Secretary and Treasurer be instructed to make a lump sum settlement, not to exceed $1500.00 with each widow now on the Pension Roll. Widows that refuse to settle will have their names erased from the Pension Roll and will be paid their monthly allowance from the Benevolent Fund, providing these allowances must continue under the insurance laws of the States.

The motion was put, but the chair being in doubt as to the result of the vote, the question was again put by rising vote, resulting as follows:

To adopt	308	To reject	199

Amendment to the amendment adopted and disposes of the amendment.

The previous question was called for, and on motion it was decided that the previous question should be now put.

The motion was put, but the chair being in doubt as to the result of the vote, the question was again put by rising vote, resulting as follows:

To adopt	313	To reject	263

Recommendation of Committee as amended is adopted."

[fol. 89] DEFENDANTS' EXHIBIT B

Copy, Letter September 23, 1931 [2 Pages]—Filed June 2, 1932

Copy

September 23, 1931.

DEAR MRS. ——: I am in receipt of your letter of —— which was in reply to my letter of July 30th, on the subject of the discontinuance of the Widows' Pension Department of the Brotherhood of Locomotive Firemen and Enginemen and a settlement of your claim. I greatly appreciate your prompt reply and the spirit of cooperation shown in a difficult situation. I hope you will appreciate the reason why there may appear to be some delay in our communications which is that we are corresponding with quite a group of individuals on this particular subject.

Our records show that the late Brother ——, your deceased husband, was a member of the Widows' Pension Department for a period of t- years. During that time he paid in assessments amounting to $— and up to this time we have paid out to you $—. In quite a number of cases even a smaller amount of benefits have been paid out. The average amount paid in by the deceased members is $70.00 and the average amount of benefits paid out to date is $742.00.

From the foregoing statement of the record of this Department it will probably not be surprising that the actuary found, upon a careful analysis of the situation, that the amount of assessments was entirely too small to meet the demands on the Department. The Convention was convinced that the required amount of assessments was entirely beyond the means of your membership to pay it. It was for this reason the Convention decided to discontinue the Department.

In discontinuing the Department and disposing of the funds on hand, the Convention instructed the International Officers to settle the claims against the Department and authorized a lump sum settlement in an amount not to exceed Fifteen Hundred Dollars ($1,500.00) with each widow on the Pension Roll. In the absence of authority to make such lump settlements, a widow would only be entitled to

each month's benefits as they fell due. Remarriage, of [fol. 90] course, immediately terminates the benefits.

After giving the matter of the method of making lump sum settlements most careful consideration, the International Officers have decided to treat every widow alike, to avoid all bartering and to offer in settlement the full amount authorized by the Convention action. It is felt that this procedure will be carrying out, in the most liberal manner, the views of the Convention with respect to settlements. This communication therefore conveys to you an offer of the Organization to settle in full all your claims against the Brotherhood and the Widows' Pension Department for a lump sum payment of Fifteen Hundred Dollars $1,500.00).

I enclose herewith a form of release and if after giving the matter careful consideration, which includes the situation in which the Brotherhood finds itself, you are prepared and willing to settle your claim for that amount, if you will sign the enclosed release, have the same witnessed and return to me, we will promptly send you the Brotherhood check for Fifteen Hundred Dollars ($1,500.00).

I fully realize the possible measure of disappointment to you in this termination of this department. Experience has shown, however, that it was doomed to failure from the start on account of the insufficiency of the assessments. It was purely an error of judgment and all of us who belonged to the Department are sustaining losses which cannot be avoided. It was started in the Brotherhood spirit of cooperation and helpfulness and now that we find it cannot be carried forward we sincerely hope you will help us to wind it up in the same Brotherhood spirit.

Yours very truly, —— ——.

[fol. 91] DEFENDANTS' EXHIBIT C

Copy, Letter Sept. 10, 1931, to Mrs. Ella E. Pinkston—Filed June 2, 1932

September 10, 1931.

Mrs. Ella E. Pinkston, 247; 311 S. Harris St., East Point, Ga.

DEAR MRS. PINKSTON: Under date of July 30th a letter was addressed to you, explaining the conditions and cir-

cumstances found to exist in connection with our Widows' Pension Department.

In this letter we asked you to furnish us with certain information, and up to the present time it has not been received. It may be possible that this letter did not reach you; therefore, I am enclosing another copy for your information.

It is our desire to take up further correspondence with you, but we are unable to do so until such time as you furnish us with the information requested in the second last paragraph of the enclosed letter.

Sincerely yours, —— ——.

DEFENDANTS' EXHIBIT D

Copy, Letter Oct. 21, 1931, to Mrs. Evelyn C. Branham [2 Pages]—Filed June 2, 1932

(Copy)

October 21, 1931.

Mrs. Evelyn C. Branham, Box 172, Addis, La.

DEAR MRS. BRANHAM: We are in receipt of your letter of October 7th enclosing signed release for Fifteen Hundren ($1,500.00) Dollars of all your claims against the [fol. 92] Widows' Pension Department of the Brotherhood of Locomotive Firemen and Enginemen under a certain Widows' Pension Certificate No. 1325 issued to your deceased husband Albert C. Branham. That letter was in reply to our letter of September 23rd, 1931.

Subsequent to sending out the proposal for settlement for the sum of Fifteen Hundred ($1,500.00) Dollars to each widow on the Widows' Pension Roll, one of the widows saw fit to institute suit in the Federal District Court at Cleveland, Ohio, to prevent the consummation of these settlements. She asked for a receiver and a restraining order. The Court refused to appoint a receiver but was of the opinion that our correspondence to the widows had not sufficiently advised them of their rights. The Court accordingly granted a Restraining Order to prevent further settlements until complete information had been given the

widows concerning their rights and until the propriety of such settlements had been determined.

The officers of the Brotherhood had no desire to take advantage of any widow or secure any unfair settlements. It was anticipated that if all widows settled on a basis of Fifteen Hundred ($1,500) Dollars each there would be a considerable sum left in the fund to distribute back to the members who paid it in. Such settlements would entail a partial sacrifice by every widow, but each member of the Department would receive as his distributive share only a small fraction of the assessments paid in.

The average amount of assessments paid by each deceased member is $69.71. The average amount paid out to each widow at the time of discontinuing the payments was $741.90. In addition to what has already been paid, $1,500.00 was proposed in settlement. Seventy-one widows have received benefits from the Department which contained about 6,459 members. None of the wives of living members will, if widowed, receive anything.

Under the proposed settlement plan, widows of deceased members will have received altogether an average of $2,241.90. If all the widows settled, the surviving members who paid assessments will receive an insignificant amount as their distributive share of any balance in the fund, about $30.00 each.

[fol. 93] Although you have agreed to settle for $1,500.00 we are required by the action of the court to advise you that if you do not care to settle for $1,500.00, you are entitled to receive and will receive from the funds of this Department the sum of $35.00 per month as heretofore in accordance with the terms of your Widows' Pension Certificate and so long as you do not remarry.

While of necessity the payments of $35.00 per month will terminate if the fund becomes exhausted, a recent appraisal of the fund shows cash in the amount of approximately $65,000.00 and securities having a present market value of approximately $230,000.00. The right of widows to receive $35.00 per month from the fund is a prior right in the fund and no distribution can be made to living members until the rights of about eighty widows have been provided for. According to expectancy and annuity tables the fund is practically sufficient to pay $35.00 per month to the eighty widows during the remainder of their lives and so

long as they remain unmarried, and provided there is no unusual depreciation in the securities.

Prior to receiving the information herein contained, about fifty widows had signified their willingness to settle for $1,500.00 and a similar communication is going forward to each one. The delay occasioned by the court action has produced a different situation and, although not required by the Court to do so I am enclosing herewith check for $70.00 covering Pension Payments for the months of August and September. The object of this is that your decision on the question of settlement will not be too greatly influenced by your immediate needs brought about by the failure of such payments.

The release already sent in is not considered binding on you. If you prefer to receive $35.00 per month from the fund and until you remarry, upon your advices to that effect, payments in the future will be on that basis. In the event, however, you are still willing to settle your claims for the sum of Fifteen Hundred ($1,500.00) Dollars, upon receipt of your advices to that effect, the same will be submitted to the Court and, if approved, check for that amount will promptly be forwarded.

I regret the delay in this matter which is unavoidable and trust to be favored with your reply by return mail.

Sincerely yours, —— ——.

[fol. 94] DEFENDANTS' EXHIBIT E

Copy, Letter Oct. 22, 1931, to Mrs. Rachel S. Burns [2 Pages]—Filed June 2, 1932

Copy

October 22, 1931.

Mrs. Rachel S. Burns, 1003 Ross Street, Medicine Hat, Alberta, Canada.

DEAR MRS. BURNS: We wrote you under date of September 23rd 1931, offering to pay in full settlement of all your claims against the Widows' Pension Department of the Brotherhood of Locomotive Firemen and Enginemen under your Widows' Pension Certificate No. 2123 issued to your

deceased husband, William Burns, but have not received any reply to that offer.

Subsequent to sending out the proposal for settlement for the sum of Fifteen Hundred Dollars ($1,500.00) to each widow on the Widows' Pension Roll, one of the widows saw fit to institute suit in the Federal District Court at Cleveland, Ohio, to prevent the consummation of these settlements. She asked for a receiver and a restraining order. The Court refused to appoint a receiver but was of the opinion that our correspondence to the widows had not sufficiently advised them of their rights. The Court accordingly granted a Restraining Order to prevent further settlements until complete information had been given the widows concerning their rights and until the propriety of such settlements had been determined.

The officers of the Brotherhood had no desire to take advantage of any widow or secure any unfair settlements. It was anticipated that if all widows settled on a basis of Fifteen Hundred Dollars ($1,500.00) each there would be a considerable sum left in the fund to distribute back to the members who had paid it in. Such settlements would entail a partial sacrifice by every widow, but each member of the Department would receive as his distributive share only a small fraction of the assessments paid in.

The average amount of assessments paid by each deceased member is $69.71. The average amount paid out to [fol. 95] each widow at the time of discontinuing the payments was $741.90. In addition to what has already been paid, $1,500.00 was proposed in settlement. Seventy-one widows have received benefits from the Department which contained about 6,459 members. None of the wives of living members will, if widowed, receive anything.

Under the proposed settlement plan, widows of deceased members will have received altogether an average of $2,241.90. If all the widows settled, the surviving members who paid assessments will receive an insignificant amount as their distributive share of any balance in the fund, about $30.00 each.

Although you have not agreed to settle for $1,500.00 we are required by the action of the Court to advise you that if you do not care to settle for $1,500.00 you are entitled to receive and will receive from the funds of this Department the sum of $35.00 per month as heretofore in accordance

with the terms of your Widows' Pension Certificate and so long as you do not remarry.

While of necessity the payments of $35.00 per month will terminate if the fund becomes exhausted, a recent appraisal of the fund shows cash in the amount of approximately $65,000.00 and securities having a present market value of approximately $230,000.00. The right of widows to receive $35.00 per month from the fund is a prior right in the fund, and no distribution can be made to living members until the rights of about eighty widows have been provided for. According to expectancy and annuity tables the fund is practically sufficient to pay $35.00 per month to the eighty widows during the remainder of their lives and so long as they remain unmarried, and provided there is no unusual depreciation in the securities.

Up to this time, and prior to receiving the information herein contained, about fifty widows had signified their willingness to settle for $1,500.00. Although we are restrained by action of the Court from consummating any further settlements until approved by the Court, we are permitted to make payments from the fund in the manner authorized by the Constitution of the Brotherhood and the terms and conditions of the Widows' Pension Certificates.

While not required by the Court to do so, we are enclosing herewith check for Seventy Dollars ($70.00) covering Pension payments for the months of August and Septem-
[fol. 96] ber. The object of this is that your decision on the question of settlement will not be too greatly influenced by your immediate needs brought about by the failure of such payments. We, however, are desirous of getting this matter on a definite basis and would therefore appreciate a definite expression from each widow. If you prefer to receive $35.00 per month from the fund and until you remarry, upon your advices to that effect payments in the future will be on that basis. In the event, however, you are still willing to settle your claims for the sum of Fifteen Hundred Dollars ($1,500.00) upon receipt of your advices to that effect the same will be submitted to the Court and, after approved, arrangements will be made to consummate the settlement.

Trusting to receive a definite expression from you at your earliest convenience, I am.

Sincerely yours, —— ——.

DEFENDANTS' EXHIBIT F

Copy, Letter Oct. 22, 1931, to Mrs. Elsie D. Bailey [2 Pages]—Filed June 2, 1932

Copy

October 22, 1931.

Mrs. Elsie D. Bailey, 317 Chestnut Street, Harrisburg, Pa.

DEAR MRS. BAILEY: Under date of October 1st, 1931 we sent you a check on the Widows' Pension Department Fund for Fifteen Hundred Dollars ($1,500.00) in full settlement of all your claims under the Widow's Pension [fol. 97] Certificate No. 1384 held by your deceased husband Paul D. Bailey in the Brotherhood of Locomotive Firemen and Enginemen. We also received from you a release in consideration of that amount.

Subsequent to sending out the proposal for settlement for the sum of Fifteen Hundred Dollars ($1,500.00) to each widow on the Widows' Pension Roll, one of the widows saw fit to institute suit in the Federal District Court at Cleveland, Ohio, to prevent the consummation of these settlements. She asked for a receiver and a restraining order. The Court refused to appoint a receiver but was of the opinion that our correspondence to the widows had not sufficiently advised them of their rights. The Court accordingly granted a Restraining Order to prevent further settlements until complete information had been given the widows concerning their rights and until the propriety of such settlements had been determined.

The officers of the Brotherhood had no desire to take advantage of any widow or secure any unfair settlements. It was anticipated that, if all widows settled on a basis of Fifteen Hundred Dollars ($1,500.00) each there would be a considerable sum left in the fund to distribute back to the members who had paid it in. Such settlements would entail a partial sacrifice by every widow, but each member of the Department would receive as his distributive share only a small fraction of the assessments paid in.

The average amount of assessments paid by each deceased member is $69.71. The average amount paid out to each widow at the time of discontinuing the payments was $741.90. In addition to what has already been paid $1,500.00 was proposed in settlement. Seventy-one widows

have received benefits from the Department which contained about 6,459 members. None of the wives of living members will, if widowed, receive anything.

Under the proposed settlement plan, widows of deceased members will have received altogether an average of $2,241.90. If all the widows settled, the surviving members who paid assessments will receive an insignificant amount as their distributive share of any balance in the fund, about $30.00 each.

Although you have agreed to settle for $1,500.00 we are required by the action of the Court to advise you that if you do not care to settle for $1,500.00, you are entitled to [fol. 98] receive and will receive from the funds of this Department the sum of $35.00 per month as heretofore in accordance with the terms of your Widow's Pension Certificate and so long as you do not remarry.

While of necessity the payments of $35.00 per month will terminate if the fund becomes exhausted, a recent appraisal of the fund shows cash in the amount of approximately $65,000.00 and securities having a present market value of approximately $230,000.00. The right of widows to receive $35.00 per month from the fund is a prior right in the fund and no distribution can be made to living members until the rights of about eighty widows have been provided for. According to expectancy and annuity tables the fund is practically sufficient to pay $35.00 per month to the eighty widows during the remainder of their lives and so long as they remain unmarried, and provided there is no unusual depreciation in the securities.

Prior to receiving the information herein contained about sixteen widows had accepted the settlement and about thirty-four more had signified their willingness to settle on this basis. A communication similar to this is going forward to each widow who has accepted the settlement. The release sent in by you is not held to be binding and this is to give you another opportunity to determine your final course of action in the light of the foregoing information.

If you prefer to receive $35.00 per month from the fund as long as it lasts or until you remarry, and will return to us, prior to October 31, 1931, the sum of Fourteen Hundred Thirty Dollars ($1,430.00), which is the amount of Fifteen Hundred Dollars ($1,500.00) less Seventy Dollars ($70.00)

for the August and September payments we will cancel the release and your payments in the future will be on the basis of $35.00 per month. In the event, however, you are still willing to accept the sum of Fifteen Hundred Dollars ($1,500.00) heretofore sent you in full settlement of all your claims, it would be greatly appreciated if you will so advise, so that your case can be marked accordingly.

Sincerely yours, —— ——.

CK.

[fol. 99] STIPULATION IN RE DEFENDANTS' EXHIBIT A—Filed Nov. 2, 1932

It is stipulated that the pertinent portions of defendants' Exhibit A appear in the testimony of David B. Robertson.

Garfield, Cross, MacGregor, Daoust & Baldwin, Attorneys for Complainant. Thos. Stevenson, Attorney for Defendants.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION OF COURT—Filed July 2, 1932

WEST, J.:

The well-known Brotherhood of Locomotive Firemen & Enginemen established a Widows Pension Department with the object of enabling members to make provision for their widows and widowed mothers after decease of the husband or son. A fund was raised by assessments on such members of the order as joined the particular enterprise, and was placed in custody of the president, assistant president, and general secretary and treasurer of the Brotherhood, by appropriate provisions of its Constitution. Each member of the fund in good standing received a Widows Pension Certificate, reciting that in event of death of the member the widow or widowed mother beneficiary, is entitled to the benefits set forth in the Widows Pension Department, all claims attaching only to funds of that particular department. Article 12 of the Constitution of the Brotherhood provided for

the organization and operation of the department, and Sec. 11 (a) stated that the beneficiary should, on proof of death of the member, "receive from the funds of this [fol. 100] department a pension of $35 per month during her life time provided she does not remarry." Some 6,000 members joined this department, and when suit was filed, about eighty claims under the above certificate had matured. The assessments fixed in the constitution were entirely too low and the Brotherhood convention meeting in June-July, 1931, found the fund actuarially insolvent, and by appropriate action discontinued the department. It was duly resolved that the president and general secretary and treasurer make lump sum settlements for not to exceed $1,500 wi-h each benficiary holding a matured certificate; that the monthly payments to such as declined to make settlement be paid from the benevolent fund of the order if the laws of the various states so required; and that the assets remaining in the pension fund be distributed to living members of the department. Securities and cash in the pension fund in question were shown to have a present value of approximately $270,000. On July 30, 1931, the beneficiaries holding matured pension certificates were notified of the action of the convention and the necessity therefor due to inadequate assessments. They were advised of the proposed settlements and it was stated that the department would be discontinued on August 1, after which no monthly checks would be forwarded.

The plaintiff, Mrs. Ella E. Pinkston, a resident of Georgia, was the holder of a matured widows pension certificate and a recipient of the notice of July 30. On September 29 she filed her bill of complaint setting out the foregoing and other facts, and on behalf of herself and other holders of similar certificates said to have a common interest with her in the subject-matter of the suit, sought to have a trust declared in the pension fund, and the defendants Robertson, Shea, and Phillips, who were officers of the Brotherhood and in charge of the fund, to account for such moneys; for the appointment of a receiver to take charge of the fund; for an order fixing priorities of various claimants; and for an injunction against further disbursements except under order of the court. A preliminary injunction was allowed, but

the prayer for a receiver was denied. Thereafter a motion to dismiss the bill for misjoinder of parties and failure to state a cause of action, was filed and overruled. The cause recently came on for final disposition and was heard upon the evidence and argued by counsel.

[fol. 101] The court has come to the conclusion that it is without jurisdiction because the amount involved in this controversy is less than $3,000. Eberhard v. N. W. Mutual Life Ins. Co., 241 Fed. 353 (C. C. A. 6), is authority for the view that the plaintiff's claim against the fund in question is a several claim, and the claims of other similarly situated, who have not joined in with her in the prosecution of the suit, can not be added to her claim in order to make up the jurisdictional amount. It is said on p. 356:

"that it may be properly a class action does not affect the rule against aggregation, because the rule is necessarily one applicable to those class actions in which several claimants to a fund are joined as plaintiffs asserting common and undivided rights therein."

See also Clay v. Field, 138 U. S. 464.

When she filed her suit plaintiff alleged failure to make payments of $35 a month to her since August 1, 1931. As stated above, she is entitled to no more than monthly payments of this amount during her life and widowhood. On the trial she produced evidence that she is still unmarried, and expert testimony that she has a life expectancy of 27.61 years, and that the net present worth as of August 31, 1930, *of her life annuity payable* $35 a month, is $5,080.84.

But in my opinion, this sum does not represent the amount in controversy in the case. By no possibility can plaintiff now recover judgment for such a sum, for her right to receive it is dependent on the condition that she survives and remains unmarried. And the court can not say that these are contingencies that are bound to occur in the ordinary course of things. In 1 Cyc. of Fed. Proced., Sec. 66, it is said:

"While future claims and demands, which are contingent in nature and may never accrue can not be reckoned, the controversy embraces future increase or augmentation of the claim or dispute presently made, which will occur in the ordinary course of things."

In Wright v. Mutual Life Ins. Co., 19 F. (2d) 117, affirmed 276 U. S. 602, it was held that the district court had no jurisdiction of an action against an insurance company for seven monthly installments of $60 each, even though [fol. 102] the income was to continue for twenty years at all events. The court held that the matter in controversy was the amount for which appellant could recover judgment, which amount could not exceed $420. The fact that a recovery of this sum would work an estoppel as to liability for future installments, the aggregate of which would exceed the jurisdictional amount, was held to be entirely immaterial. The collateral effect of the judgment is not the test of jurisdiction. See Elgin v. Marshall, 106 U. S. 578, where the subject is elaborately discussed. Also New England Mortgage Co. v. Gay, 145 U. S. 123; City of Belton v. Omaha Trust Co., 17 F (2d) 90 (C. C. A. 5); Elliott v. Empire Natural Gas Co., 4 F. (2d) 493 (C. C. A. 8).

As the only ground of federal jurisdiction is diversity of citizenship of the parties, and under the above authorities the requisite amount to confer jurisdiction is not present, the court has no option but to dismiss the cause without prejudice, at the plaintiff's costs. Decree accordingly.

S. H. West, Judge.

July 2, 1932.

IN UNITED STATES DISTRICT COURT

COMPLAINANT'S MOTION FOR REHEARING—Filed July 15, 1932

Now comes Complainant and moves for a rehearing herein on the ground that the decision of the court as announced in its opinion dated July 2, 1932, is contrary to law.

Smith, Hammond, Smith & Bloodworth; Garfield, Cross, MacGregor, Daoust & Baldwin, Attorneys for Complainant.

[fol. 103] IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION ON MOTION FOR REHEARING—Filed July 26, 1932

WEST, J.:

The plaintiff filed her motion for rehearing on the ground that the decision rendered on July 2 dismissing the suit for

want of federal jurisdiction was contrary to law. This is regarded as a petition for rehearing under Equity Rule 69, and briefs have been received.

Counsel for plaintiff contend that the right which she seeks to have protected has an admitted present value of more than $5,000; and further, that in none of many cases cited in the brief did the complainants have a right more certainly exceeding the jurisdictional amount than plaintiff's herein. The cases referred to are Thompson v. Thompson, 226 U. S. 551, which involved statutory allowance and maintenance; Smith v. Whitney, 116 U. S. 167, to prevent cutting off a paymaster's salary, which during his unexpired term would exceed $5,000; Bitterman v. L. & N. R. R. Co., 207 U. S. 205, scalping of non-transferable railroad tickets; Hunt v. New York Cotton Exchange, 205 U. S. 322, involving the right to control quotations; Berryman v. Whitman College, 222 U. S. 334, the right of a college to be perpetually exempt from taxation; Glenwood Light Co. v. Mutual Light Co., 239 U. S. 121, involving the right to operate telephone line without interference from the structures of a competing company; New York Life Ins. Co. v. Swift, 38 F. (2d) 175, the right to cancel a $10,000 life insurance policy obtained by false representations; with a few other cases of the type of one or another of the foregoing.

The court realizes that it is the value of plaintiff's right which measures the amount now in controversy, and not what she could recover on her certificate (which on its face is spoken of as a contract) at the present moment; but is not convinced that such right has been proved to be of the value necessary to confer jurisdiction. The testimony based on Mrs. Pinkston's expectancy would be sufficient if the only hazard to be considered were her death. But her remarriage also enters into the question, and that depends entirely on matters purely personal to the plaintiff and others, and is not subject to statistics or tables. This being true, I am not at all convinced that plaintiff's right to receive monthly payments hereafter is as definite and certain as were the future rights which were involved in the cases [fol. 104] listed above. For example, the right of a corporation to be protected against illegal taxes, or interference with its business, continues indefinitely in the future.

The Thompson case, supra, is peculiar in its facts, which may account for its never having been followed on this point so far as I can learn. In 168 Ky. 786 its anomalies are mentioned.

Counsel also insist that this is a case where a trust fund is involved, where the rights of their client and other holders of matured certificates are of such nature that if one sues it must be for the benefit of all, and that the claims of each may be aggregated in order to determine the jurisdiction. Handley v. Stutz, 137 U. S. 366 is the case probably most relied on. On this point I think that case is now little if any authority. In Lion Bonding Co. v. Karatz, 262 U. S. 77, at p. 86, the court says in a note:

"Where a creditor's bill has been entertained by this Court, the amount of a single plaintiff's claim has been large enough to satisfy the jurisdictional requirement. Compare Hatch v. Dana, 101 U. S. 205; Johnson v. Waters, 111 U. S. 640; Handley v. Stutz, 137 U. S. 366."

I am unable to distinguish Eberhard v. Northwestern Mut. Life Ins. Co., 241 Fed. 353 (6 C. C. A.) from this case at bar. The Supreme Court cites it with approval in its opinion in the Karatz case, supra. Two decisions by the Seventh Circuit Court which also appear to meet the question are Woods v. Thompson, 14 F. (2d) 951, and Robbins v. Western Automobile Ins. Co., 4 F. (2d) 249.

The plaintiff and other widows and mothers holding certificates do not claim under a single title or right, and it is only when such claimants have a common undivided interest, and unite to enforce a single title or right that their claims can be aggregated. Lion Bonding Co. v. Karatz, supra, p. 86.

Attention is called to King v. Kansas City Police Relief Ass'n, a very recent district court decision. It holds that in a suit for appointment of a receiver to conserve relief funds, brought by a former member of the association who was entitled to withdrawal rights, plaintiff's claim could be aggregated with the claims of others similarly situated; and that the amount in controversy was the amount of the fund. It may be that the case is distinguishable because all claimants paid in under a common arrangement and had [fol. 105] a joint claim on the fund; while here the plaintiffs did not contribute to the fund, but have claims against it

based on the contracts or certificates made for their benefit by those who did contribute.

In any event, this court will follow the decision of the Sixth Circuit Court.

The court adheres to its view that it has not jurisdiction.

S. H. West, Judge.

July 26, 1932.

IN UNITED STATES DISTRICT COURT

ORDER DISMISSING CASE UPON GROUND OF NO JURISDICTION ON PART OF THE COURT—Entered August 1, 1932

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that as the only ground of federal jurisdiction is diversity of citizenship of the parties and the Court now finding as a fact that the matter in controversy does not exceed the sum or value of $3,000 exclusive of interest and costs and as a conclusion therefrom that it has no jurisdiction hereof, this cause is hereby dismissed without prejudice at the complainant's costs, and the temporary injunction heretofore allowed be, and the same hereby is dissolved. To all of which plaintiff excepts.

[fol. 106] IN UNITED STATES DISTRICT COURT

COMPLAINANT'S APPLICATION FOR STATEMENT OF COURT'S FINDINGS OF FACT—Filed Aug. 1, 1932

Now comes the complainant by her counsel, and applies for a statement of the Court's findings of fact and conclusions of law with respect to the material issues in this case, pursuant to Equity Rule 70½.

Garfield, Cross, MacGregor, Daoust & Baldwin, Attorneys for Complainant.

Copy of above application received this 1st day of August, 1932.

Thos. Stevenson, H. C. H., Attorney for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER DENYING APPLICATION FOR STATEMENT OF COURT'S FINDINGS OF FACT—Entered Aug. 1, 1932

This cause came on to be heard this day on the application of complainant for a statement of the Court's findings of fact and conclusions of law, and on consideration thereof the Court denies said application except as to the findings of fact and conclusions of law set forth in the final decree of this Court.

To the foregoing complainant excepts.

S. H. West, Judge.

Dated Aug. 1, 1932.

[fol. 107] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR REHEARING—Entered Sept. 20, 1932

This day this cause came on to be heard on the motion of complainant for rehearing, and was submitted to the Court; on consideration thereof the Court denies and overrules said motion for rehearing.

To the foregoing complainant excepts.

S. H. West, Judge.

Dated Sept. 20, 1932.

OK as to form.
Garfield, Cross, MacGregor, Daoust & Baldwin, Attorneys for Plaintiff.

OK as to form.
Thomas Stevenson, by H. C. Heiss, Attorney for Defendants.

IN UNITED STATES DISTRICT COURT

DEFENDANTS' MOTION REQUESTING THAT TIME FOR FILING DEFENDANTS' OBJECTIONS AND EXCEPTIONS AND PROPOSED AMENDMENTS TO PLAINTIFF'S NARRATIVE FORM BILL OF EXCEPTIONS BE EXTENDED—Filed Oct. 17, 1932

Now come defendants by counsel and each severally and separately request that the time for filing defendants' objections and exceptions and proposed amendments to the

Plaintiff's Narrative Form *of* Bill of Exceptions be extended to October 20th, 1932.

Thos. Stevenson, Attorney for Defendants.

[fol. 108] Notice

The plaintiff will take notice that the defendants will present this Motion to the Court for its approval at 1:15 o'clock, P. M. this 17th day of October, 1932.

Thos. Stevenson.

Acknowledgment

Receipt of two copies of the above Motion acknowledged this 17th day of October, 1932.

Garfield, Cross, MacGregor, Daoust & Baldwin.

In United States District Court

Order Granting Motion for Extension of Time—Entered Oct. 17, 1932

On application of counsel for defendants, and for good cause shown, it is hereby ordered that the time for filing defendants' objections and exceptions and proposed amendments to plaintiff's Narrative Form *of* Bill of Exceptions in the above cause be extended to October 20th, 1932.

[fol. 109] In United States District Court

Defendants' Objections to Plaintiff's Narrative Form Bill of Exceptions—Filed Oct. 20, 1932

Now comes the defendants and each severally and separately submit the following objections to "Plaintiff's Narrative Form Bill of Exceptions."

I

Defendants object to the allowance of the document entitled, "Plaintiff's Narrative Form Bill of Exceptions," there is no practice or rule providing for the filing, allow-

ance or incorporation into the record of any such instrument in any proceeding.

II

Defendants object to the allowance of the document entitled, "Plaintiff's Narrative Form Bill of Exceptions," as a Bill of Exceptions, for the reasons (1) the litigation is a suit in equity in which case there is no provision for a Bill of Exceptions, and (2) the instrument was not delivered to the Clerk in accordance with the provisions of Rule 38 of this Court. The final decision in this cause was made and entered August 1st, 1932, and this instrument was lodged with the Clerk of the Court, October 13th, 1932—more than Seventy (70) days after the decision of the Court. No extension of time was granted nor application for such extension made before the expiration of Fifty (50) days after the date of the decision of the Court.

III

Defendant's object to the allowance of the document entitled, "Plaintiff's Narrative Form of Bill of Exceptions," as a Narrative Form of Testimony as directed by Equity Rule 75 of the Supreme Court of the United States, for the reason that it was not lodged in the Clerk's Office within Forty (40) days after the entry of the final decree in this cause in accordance with the provisions of Rule 38 of this Court.

The Final Decree of this Court was entered August 1st, 1932. The document entitled, "Plaintiff's Narrative Form Bill of Exceptions" was lodged in the Office of the Clerk October 13th, which is more than Seventy (70) days after the entry of the Final Decree. Rule 38 of this Court provides that Narrative Forms of Testimony as directed by [fol. 110] Equity Rule 75 of the Supreme Court of the United States shall be lodged in the Clerk's Office within Forty (40) days after the entry of the decree from which an appeal is to be taken, unless the time shall be enlarged by the Court. There was no enlargement of the time for filing a Narrative Form of Testimony under Rule 38 in the instant case.

Although the docket shows the entry of an Order September 20th, 1932, overruling Motion for a Rehearing,

there was no Motion for Rehearing pending before the Court at that time. After the hearing on the merits, this Court rendered its decision dated July 2, 1932, that it was without jurisdiction, and that the Court had no option but to dismiss the cause without prejudice at the plaintiff's costs. Thereafter, on July 15th, 1932, and before a Decree was entered on that decision, the Complainant filed a Motion for Rehearing. This Motion for Rehearing was submitted to the Court on Briefs and the Court ruled upon the same in a memorandum dated July 26th, 1932. The said Motion for Rehearing was regarded by this Court as a Petition for Rehearing under Equity Rule 69 and the ruling of the Court was that "the Court adheres to its view that it has not jurisdiction."

Thereafter and on August 1st, 1932, the final Order dismissing the cause without prejudice at complainant's costs was signed and entered. Subsequent to the entry of the final order of August 1st, 1932, no pleading or motion of any kind was filed by the complainant.

IV

The defendants object to the incorporation into any Bill of Exceptions or Narrative Form of Testimony of the opening statements of counsel which are contained in pages 2 to 12, Second line, inclusive, in the document entitled, "Plaintiff's Narrative Form Bill of Exceptions."

The opening statements of counsel and a colloquy between Court and counsel are not testimony and cannot properly be incorporated into any Narrative Form of Testimony.

V

The defendants object to the omission on page 58 of "Plaintiff's Narrative Form Bill of Exceptions" of the following statements and admissions of Counsel for Complainant during the argument:

[fol. 111] "The Court: Well, the court wants to know whether counsel for plaintiff has any objection to these settlements?

Mr. Bryan: I understood, on the information that has been developed in this hearing, we have no serious objection to that being effected.

The Court: I should not think you would, representing the interests you do, it seems to me you should consent very

readily to these settlements being made, because, as stated, every one adds to the value of the interests you represent.

Mr. Schultz: That being true as to the ages as shown. De didn't have the ages in the other hearing, it having been estimated that there would be some with an expectancy of one or two years. We will say to the court we will not object——

The Court: He will have to go further than that. It will have to be by consent of the parties in the decree.

Mr. Schultz: In the light of the information developed, we will consent to the settlements.

The Court: Very well, that relieves my mind of that one question. I am not saying how the case ought to be decided, but that point, of course, is important from the Court's standpoint, to have it withdrawn."

In the event there is any allowance of Narrative Form of Testimony or Bill of Exceptions or other record on appeal the defendants submit the foregoing statements and admissions should be included therein to clearly indicate to an Appellate Court the disposition of one of the major issues in the cause.

VI

The Defendants object to the incorporation of the following statement on page 58 of "Plaintiff's Narrative Form Bill of Exceptions":

"Thereafter the Court rendered its decision, which was in favor of the Defendants and against the Complainant, dismissing the cause without prejudice at Complainant's costs, and judgment and decree were thereafter entered in accordance therewith, to which Complainant duly excepted; Complainant filing a Motion for Rehearing which said Motion, after due consideration by the Court was overruled on September 20, 1932."

[fol. 112] The foregoing statement is not testimony and is improper in a Narrative Form of Testimony under Rule 75 of the Supreme Court of the United States. Furthermore, it is not in accordance with the facts and the record in this cause.

In the event there is any allowance of Narrative Form of Testimony or Bill of Exceptions or other record on ap-

peal the Defendants submit the following statement of the proceedings subsequent to the trial on the merits and the submission of the cause to the Court:

"Thereafter the court rendered its opinion that it had no option but to dismiss the cause without prejudice at plaintiff's costs; thereupon the complainant filed a Motion for Rehearing which was submitted to the Court on Briefs, regarded by the Court as a Petition for Rehearing under Equity Rule 69 and ruled upon by the Court in favor of the Defendants and against the Complainant;

"Thereafter and on August 1st, 1932, a judgment and decree were entered in accordance with the decision of the Court, dismissing the cause without prejudice at Complainant's costs to which Complainant duly excepted;

"Thereafter and on September 20th, 1932, an Order was entered overruling Motion for a Rehearing."

The Defendants each severally and separately respectfully request (1) that the document entitled, "Plaintiff's Narrative Form Bill of Exceptions" be not allowed, as there is no rule providing for the filing of such an instrument in any proceeding, (2) that the document entitled, "Plaintiff's Narrative Form Bill of Exceptions" be stricken from the record as, whatever considered, it was not filed in accordance with Rule 38, and (3) in the event the preceding requests are not granted, that the document may be corrected and amended in accordance herewith.

Thos. Stevenson, Attorney for Defendants.

[fol. 113] Acknowledgment

Receipt of two copies of the within "Defendants' Objections to Plaintiff's Narrative Form Bill of Exceptions" is hereby acknowledged this 20th day of October, 1932.

——-——, Attorneys for Plaintiff.

I hereby certify that I have served two copies of the within "Defendants' Objections to Plaintiff's Narrative Form Bill of Exceptions" upon attorneys for plaintiff this 20th day of October, 1932.

Harold C. Heiss.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OVERRULING DEFENDANTS' OBJECTIONS TO PLAINTIFF'S NARRATIVE FORM BILL OF EXCEPTIONS—Entered Oct. 24, 1932

10/24/32. Overruled. Defendants except.

S. H. West, J.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEFENDANTS' OBJECTIONS TO PLAINTIFF'S NARRATIVE FORM BILL OF EXCEPTIONS—Entered October 24, 1932

This day this cause came on to be heard on the defendants' objections to plaintiff's narrative form bill of exceptions, and was submitted to the Court; on consideration thereof the Court overruled said objections, to which ruling of the Court the defendants by their attorney, except.

[fol. 114] IN UNITED STATES DISTRICT COURT

REPLY TO COMPLAINANT'S OBJECTIONS TO DEFENDANTS' PRECIPE FOR TRANSCRIPT—Filed Nov. 10, 1932

The Complainant has filed her objections to Defendants' Precipe for Transcript on the ground that the papers and documents listed therein are not pertinent to the appeal. Defendants' Counter-Precipe asks that there be included in the Transcript of Record the following papers:

(1) Motion for Extension of Time for Defendants to file Objections and Exceptions to Complainant's Narrative Form Bill of Exceptions.

(2) Order granting said Motion for Extension of Time.

(3) Defendants' Objections to Plaintiff's Narrative Form Bill of Exceptions.

(4) Memorandum and Order of the Court overruling Defendants' Objections and Exceptions.

Defendants believe that these documents do pertain to the appeal. It seems to be the function of the Transcript of Record to present to the Circuit Court of Appeals a fair and complete record of the proceedings of the District

Court with regard to the case, and it is difficult to determine how defendants can properly bring to the attention of the Circuit Court the fact that these Objections and Exceptions to the Narrative Statement have been seasonably made (and not waived) unless they are included in the Record presented to the reviewing Court.

The reduction and preparation of the Record on appeal is apparently governed by General Equity Rule 75, which provides in part that should the Appellee desire additional portions of the Record incorporated into the Transcript he shall file with the Clerk his Precipe indicating the portions to be incorporated. It apparently is not within the contemplation of General Equity Rule 75 to permit Appellant to select the contents of the Record which appear to him to be vital to the exclusion of what may later be an important part of Appellee's case. If Defendants' Objections and Exceptions had been sustained in whole or part undoubtedly Complainant herself would have sought the inclusion of the Objections and the ruling thereon in the Record.

[fol. 115] Primarily, Defendants respectfully submit that the papers and orders listed in the Counter-Precipe should be included in the Record at Complainant's cost. However, should the Court conclude that Defendants are not entitled to have said papers and orders incorporated in the Transcript at Complainant's cost, the Defendants ask that the Court direct their incorporation and that such additional cost be borne by Defendants.

Respectfully submitted, Thos. Stevenson, Attorney for Defendants.

Nov. 10, 1932.

Two copies delivered to attorneys for complainant.

H. C. Heiss.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Oct. 25, 1932

To the Honorable the District Court of the United States for the Northern District of Ohio, Eastern Division and to the Honorable S. H. West, Judge of the Said Court:

The above named Complainant, feeling aggrieved by the order, judgment and decree made and entered in the above

entitled cause on the first day of August, A. D. 1932, dismissing said cause for want of jurisdiction, does hereby appeal from said order, judgment and decree to the United States Circuit Court of Appeals for the Sixth Circuit for the reason specified in the Assignment of Errors filed herewith, and she prays that her appeal be allowed and that citation [fol. 116] be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order, judgment and decree was made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Sixth Circuit under the rules of such court in such cases made and provided.

Your petitioner further prays that the proper order relating to the security required of her be made.

Ella E. Pinkston, by Garfield, Cross, MacGregor, Daoust & Baldwin; Smith, Hammond, Smith & Bloodworth, Counsel for Complainant.

Receipt of copy of the above petition for appeal is hereby acknowledged, 10/24/32.

Thos. Stevenson, by H. C. H., Counsel for Defendants.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Oct. 25, 1932

Now comes the Complainant in the above entitled cause and makes and files the following Assignment of Errors upon which she will rely in the prosecution of her appeal and which she avers occurred upon the hearing of this cause and in the rendition on August 1, 1932, or the order, judgment and decree appearing upon the record herein;

First: That the Court erred in finding as a fact that the matter in controversy did not exceed the sum or value of $3,000.00, exclusive of interest and costs;

Second: That the Court erred in entering its order, judgment and decree on the first day of August, 1932, dismissing the cause for want of jurisdiction;

[fol. 117] Third: That the Court erred in dissolving the temporary injunction allowed in said cause on or about the 5th day of October, 1931, and in refusing to make said injunction permanent;

Fourth: That the Court erred in refusing upon the pleadings and evidence to grant the relief prayed for by Complainant in her Bill of Complaint.

Wherefore, Complainant prays that the said order, judgment and decree be reversed and that said Court be directed to enter herein a decree in accordance with the prayer of the Bill of Complaint.

Garfield, Cross, MacGregor, Daoust & Baldwin; Smith, Hammond, Smith & Bloodworth, Counsel for Complainant.

Receipt of a copy of the foregoing Assignment of Errors is hereby acknowledged this 24th day of October, 1932.

Thos. Stevenson, by H. C. H., Counsel for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND FIXING BOND—Entered October 25, 1932

The above named Complainant, Ella E. Pinkston, having presented and filed a petition for an order allowing an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the final order, judgment and decree made and entered herein on August 1, 1932, and having filed her Assignment of Errors with said petition, now on motion of Messrs. Garfield, Cross, MacGregor, Daoust & Baldwin and Messrs. Smith, Hammond, Smith & Blood- [fols. 118–120] worth, solicitors and counsel for Complainant, it is hereby

Ordered that an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the said order, judgment and decree made and entered herein as aforesaid, be and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals, and it is further

Ordered that the cost bond on appeal be and hereby is fixed at the sum of $250.00.

Bond on appeal for $250.00, approved and filed Oct. 31, 1932, omitted in printing.

[fols. 121 & 122] Citation in usual form, showing service on Thos. Stevenson filed Oct. 29, 1932, omitted in printing.

[fol. 123] In United States District Court

Precipe for Transcript—Filed Oct. 29, 1932

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause, and include therein the following papers and orders:

1. Bill of Complaint.
2. Motion for Temporary Injunction and Appointment of Receiver.
3. Order Allowing Temporary Injunction.
4. Bond on Injunction.
5. Defendants' Motion to Dismiss Bill of Complaint.
6. Defendants' Application for Authority to Consummate Settlements.
7. Order Overruling Motion to Dismiss Bill of Complaint.
8. Answer.
9. Order of February 3, 1932 Granting Complainant Leave to Take Depositions.
10. Order Approving Plaintiff's Narrative Form of Testimony.
11. Plaintiff's Narrative Form Bill of Exceptions.
12. Plaintiff's Exhibits 1, 2, 3, 4, 5, 6 and 7.
13. Defendants' Exhibits B, C, D, E, F, G.
14. Stipulation in re Defendants' Exhibit A.
15. Memorandum Opinion of Court of July 2, 1932.
16. Complainant's Motion for Rehearing.
17. Memorandum Opinion on Motion for Rehearing dated July 26, 1932.
18. Order Dismissing Case dated August 1, 1932.
19. Complainant's Application for Statement of Court's Findings of Fact.
20. Order Denying Application for Statement of Court's Findings of Fact.
21. Order Overruling Motion for Rehearing dated September 20, 1932.

22. Petition for Appeal.
23. Assignment of Errors.
24. Order Allowing Appeal.
25. Bond on Appeal.
26. Citation.
27. Precipe for Transcript.
28. Stipulation re Certification of Record.
29. Certificate of Clerk.

[fol. 124] And deliver all papers to The Gates Legal Publishing Company for printing.

Garfield, Cross, MacGregor, Daoust & Baldwin, Attorneys for Complainant.

10/29/32. Copy received.

Thos. Stevenson, by H. C. H.

In United States District Court

Cross-Precipe for Transcript—Filed Nov. 7, 1932

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause, and include therein the following papers and orders:

Defendants' Motion requesting that the time for filing Defendants' Objections and Exceptions and Proposed Amendments to the Plaintiff's Narrative Form of Bill of Exceptions be extended.

Order dated October 17th, 1932, granting the Motion for Extension of Time for filing Defendants' Objections and Exceptions and Proposed Amendment to Plaintiff's Narrative Form of Bill of Exceptions.

Defendants' Objections to Plaintiff's Narrative Form of Bill of Exceptions.

Memorandum and Order Overruling Defendants' Objections to Plaintiff's Narrative Form of Bill of Exceptions.

And deliver all papers to The Gates Legal Publishing Company for printing.

Thos. Stevenson, Attorney for Defendants.

Received copy 11-7-32.

Garfield, Cross, MacGregor, Daoust & Baldwin, Attorneys for Complainant.

[fols. 125 & 126] IN UNITED STATES DISTRICT COURT

STIPULATION RE CERTIFICATION OF RECORD—Filed Oct. 31, 1932

In accordance with Section 6 of Rule 44 of the general Rules of this Court it is hereby agreed that the record as presented to the Clerk by the printer, may be certified by the Clerk as required by law and the rules of the Appellate Court, as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this cause, as set forth in the precipe for transcript, without further comparison by the Clerk.

Garfield, Cross, MacGregor, Daoust & Baldwin, Attorneys for Complainant. Thos. Stevenson, Attorney for Defendants.

[fols. 127 & 128] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 129] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION TO DISMISS APPEAL—Filed February 2, 1933

Now come the Appellees and each severally and separately move the Court to dismiss the appeal herein for the following reasons:

1. No Narrative Form of Testimony was filed in the District Court in compliance with the Rules of that Court.

2. The Appellant did not docket the case and file the record thereof with the Clerk of this Court by or before return day as provided by the rules of this Honorable Court.

3. The appeal upon its face does not present any substantial question for the consideration of this Honorable Court and the entire matter has become moot.

4. The appeal is not taken in good faith.

(Signed) Thos. Stevenson, Attorney for Appellees.

In United States Circuit Court of Appeals

Order Passing Consideration of Motion to Dismiss—Entered February 13, 1933

It is ordered that the consideration of the appellees' motion to dismiss be passed until this cause comes on for argument upon its merits.

(Signed) Chas. H. Moorman, U. S. Circuit Judge.

[fol. 130] In United States Circuit Court of Appeals

Cause Argued and Submitted—December 7, 1933

Before Moorman, Hicks and Hickenlooper, JJ.

This cause is argued by W. L. Bryan and J. R. Garfield for Appellant and by Thomas Stevenson for Appellees and is submitted to the Court.

In United States Circuit Court of Appeals

Decree—Entered March 8, 1934

Appeal from the District Court of the United States for the Northern District of Ohio

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On Consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings.

[fol. 131] In United States Circuit Court of Appeals

Opinion—Filed March 8, 1934

Before Moorman, Hicks and Hickenlooper, Circuit Judges

Moorman, Circuit Judge:

Appellant, a resident of the State of Georgia, is the holder of a widow's pension certificate issued by the Broth-

erhood of Locomotive Fireman and Enginemen which entitles her, provided she does not remarry, to receive $35 a month during her lifetime from the funds of the Widow's Pension Department of the Brotherhood. In its convention held in June and July of 1931, the Brotherhood voted to discontinue the Widow's Pension Department, and directed its officers to make lump-sum settlements with all matured certificate holders at a sum not in excess of $1,500 each, and further, to erase from the pension rolls the names of all those refusing to accept such settlements, and thereafter to distribute the residue of the funds then on hand among members of the department holding unmatured certificates. Notice of this action on the part of the Brotherhood was given to the appellant. The payment due September 1, 1931, under her certificate was not made, and she thereupon filed this bill against the Brotherhood and its executive officers, all residents of the State of Ohio, asking for an injunction restraining the disbursement of the funds of the department except as authorized by the constitution of the Brotherhood and the matured pension certificates, and that a receiver be appointed. The court granted a temporary injunction but refused to appoint a receiver. On final hearing the temporary injunction was dissolved and the bill was dismissed for want of jurisdiction on the ground that the matter in controversy did not exceed the sum or value of $3,000.

In our opinion, the matter in controversy is not the accumulated pension fund nor the combined claims of all holders of matured certificates (Lion Bonding Co. v. Karatz, 262 U. S. 77, 85), but is the rights which appellant seeks to have protected, that is, her rights under the certificate which she holds. Wisconsin Electric Co. v. Dumore Co., 35 Fed. (2d) 555, 556 (6 C. C. A.). This certificate binds the appellee to make monthly payments to appellant so long as she lives, provided she does not re- [fol. 132] marry, and in determining the value of her right to these payments it is permissible to take into consideration the probable duration of her life. The evidence shows that the normal expectancy of her life is 27.61 years, and that the present worth of her pension rights for that period is over $5000. The trial court held that the contract stipulation that the payments were to cease upon the appellant's remarriage as well as upon her death made the present

value of these rights speculative and therefore prevented any computation thereof from being taken into account in determining the amount in controversy.

We think Thompson v. Thompson, 226 U. S. 551, is controlling. In that case the Supreme Court of the District of Columbia in a separate maintenace suit directed the husband to pay $500 for counsel fees and $75 a month for maintenace of a wife and child. The Court of Appeals of the District reversed the decree and the wife appealed to the Supreme Court of the United States, where the husband contended that the court lacked jurisdiction because it could hear only causes in which the matter in dispute, exclusive of costs, exceeded the sum of five thousand dollars. At that time the case was decided the accrued payments did not amount to the necessary $500, but the court held that, considering the expectancy of the lives of the parties, the prospective payments were sufficient to make up the deficiency. In denying that the claim to these payments was contingent the court said: The decree "clearly and finally settles the obligation of the husband to contribute to the support of the wife and offspring, and fixes the amount of contributions required for the present to fulfill that obligation. The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased or even cut off, as just indicated."

Appellees contend that the Thompson case is distinguishable from the case at bar in that in that case the payments could only be stopped by an order of court, whereas here they are to terminate automatically upon appellant's remarriage. It is generally held that remarriage is a sufficient ground to modify an alimony or maintenace award, and that being true, there is no distinction between future payments decreed in such a case and those claimed under contract such as the case at bar, for the wife's volition to remarry is the basis in either case of the change in obliga- [fols. 133 & 134] tion. We think the reasoning of the Thompson case is applicable to the present situation, and that the present worth of the future pension payments is not to be deemed so contingent or speculative as to prevent its being taken into account in determining the value of the matter in controversy, although such payments may be entirely cut off by the appellant's remarriage.

The failure of the appellant to file a narrative form of testimony in the District Court within the time allowed by Rule 38 of that court does not prevent our consideration of the testimony. Alliance Securities Co. v. Killits, 67 Fed. (2d) 480 (6 C. C. A.). Nor has the controversy here become moot. It is true that it was stated for appellant on the oral argument that she had no objection to settlements being made with other certificate holders, but she never waived her right to object to the threatened discontinuance of the payments to her according to the certificate which she holds, and appellees' promise to continue them cannot be accepted as nullifying the action taken by the Brotherhood in convention.

The decree below is reversed and the cause remanded for further proceedings.*

[fol. 135] In United States Circuit Court of Appeals, Sixth Circuit

No. 6355

Ella E. Pinkston, Appellant,

vs.

Brotherhood of Locomotive Firemen and Enginemen, David B. Robertson, Timothy Shea and Albert Phillips, Appellees

No. 4017. Equity

Appeal from the District Court of the United States, Northern District of Ohio, Eastern Division

Petition for Rehearing—Filed April 3, 1934

The undersigned, your petitioners, respectfully submit that they have been aggrieved by an Opinion of your Honors rendered herein on the 8th day of March, 1934, in the respects hereinafter set forth, and pray for a Rehearing of said matter.

---

*Judge Hickenlooper participated in the conference decision, but this opinion was not prepared until after his death.

Jurisdictional Amount

The Decree of the Court below dismissing the Petition for the reason that the jurisdictional amount is not involved is reversed and the cause remanded on the authority of Thompson v. Thompson, 226 U. S. 551. It is respectfully submitted the decision in that case is not applicable to the case at bar.

[fol. 136] It has been uniformily held by the United States Supreme Court that the requirements for jurisdiction in the Federal Courts are strictly applied. The jurisdiction must clearly appear. The judiciary act was intended to contract the jurisdiction of the Federal Courts and all doubts must be resolved against their jurisdiction. Joy v. City of St. Louis, et al., 122 Fed. 524. Affirmed by the United States Supreme Court 201 U. S. 332.

In support of our suggestion that the Thompson case is not applicable it will be observed that the Supreme Court specifically pointed out the future payments in the case were not contingent or speculative but were "fixed" by the Decree of the Court below. After discussing that a decree for statutory maintenance is subject to modification that court said:

"Nevertheless, such a decree *clearly and finally settles* the obligation of the husband to contribute to the support of the wife and offspring, and *fixes* the amount of contributions required for the present to fulfill that obligation. The future payments are not in any proper sense *contingent* or speculative, although they are subject to be increased, decreased or even cut off as just indicated." (Italics ours.)

By this statement the Court brings that case clearly within the established rule with respect to future accretions. The future payments are not "contingent." being "fixed" by the Court Decree. This was obviously for the reason that there was no qualification surrounding the future payments and no act of the wife nor any changed circumstances would, by their own force, affect the payments which had been fixed.

The clear distinction in the case at bar is that the right to future payments under the Certificate is not "fixed." It is a qualified right, the right being subject to a condition [fol. 137] precedent. Under the terms of the Certificate,

if the widow is to receive a future payment, she may not remarry. It is specifically provided that, if she remarries, "payment shall cease." The changed condition brought about by remarriage in and of itself defeats any right to future payment. Under such circumstances future payments are not fixed.

As future payments to the holders of matured certificates in the case at bar are contingent, if a widow were to bring suit on one of these certificates on the theory of its breach, under no circumstances could her damages be based upon life expectancy. In such case we respectfully submit that the rule of strict construction again applied in the case of Wright v. Mutual Life Insurance Company, 19 Fed. (2d) 117, affirmed in a Memorandum Opinion by the Supreme Court, in 276 U. S. 602, is applicable to the case at bar.

In affirming the decision in the Wright case the Supreme Court cited as authority the leading case of Elgin v. Marshall 106 U. S. 578 and a number of subsequent cases. In Elgin v. Marshall the reasons for the rule of strict construction are given. At page 580 it is stated.

"The rule, it is true, is an arbitrary one, as it is based upon a fixed amount, representing pecuniary value, and, for that reason, excludes the jurisdiction of this court in cases which involve rights that, because they are priceless, have no measure in money, (*Lee v. Lee*, 8 Pet. 44; *Pratt v. Fitzhugh*, 1 Black, 271; *Barry v. Mercein*, 5 How. 103; *Sparrow v. Strong*, 3 Wall. 97); but, as it draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. As jurisdiction cannot be conferred by consent of parties, but must be given by the law, *so it ought not to be extended by doubtful constructions.*" (Italics ours.)

[fol. 138] Again at page 581 the Supreme Court said:

"It is not the actual value of the judgment sought to be reviewed which confers jurisdiction, otherwise it might be required to hear evidence that it could not be collected; but it is the nominal or apparent sum or value of the subject-matter of the judgment. *It is impossible to foresee into what mazes of speculation and conjecture we may not be led by a departure from the simplicity of the statutory provision.* Accordingly, this court has uniformly been strict to adhere to and enforce it." (Italics ours.)

The Action Not Representative and the Controversy Has Become Moot

As pointed out in the Opinion of this Honorable Court it was stated for appellant that she had no objections to settlements being made with other certificate holders. In addition it was stated for her that she consented to such settlements. We respectfully submit this admission and consent destroys the representative nature of the action.

While the Bill of Complaint alleges that plaintiff brings the action on her own behalf and on behalf of all other widows similarly situated and affected, the plaintiff necessarily negatives and withdraws her allegations of representation by withdrawing objections to the settlements with other widows and consenting to them. In this position the plaintiff has reduced the case to the situation where she withdraws objections to settlements with all other widows and consents to them yet, at the same time, seeks to enjoin the Brotherhood from making the settlements. The plaintiff stands alone. If she has suffered any legal wrong (and we submit she condoned any she may have had by accepting payments) she has a full, complete and adequate remedy at law. There is now no equity in the case.

[fol. 139] Waiver

Other than the objections to settlements, which objections were withdrawn by plaintiff, the only substantial point raised or made by plaintiff is that the payment alleged to have been due under her certificate as of September 1st, 1931, was suspended. The record in the case shows without contradiction, it being admitted on her behalf, that plaintiff has since accepted that particular payment and has accepted monthly payments under her certificate ever since. If she could have maintained an action on account of failure to make a particular payment, she most certainly could not later accept the payment and retain the cause of action. The acceptance of the payment condoned the failure.

As the plaintiff, by withdrawing her objections to the settlements and consenting to them has reduced the case to an individual action, and by later accepting the payment which she alleged was wrongfully withheld in violation of her certificate thereby condoned the alleged breach, we submit the case has become moot, in equity.

Furthermore, the record shows the greatest number of outstanding matured certificates to have been Eighty-three (83). As shown by affidavit of the defendant, Albert Phillips, attached hereto and submitted herewith, subsequent to the commencement of this action Seventy-eight (78) of the beneficiaries have accepted settlement and executed release of all claims, or confirmed and ratified such settlements previously made. There now remain only Five (5) beneficiaries with matured Certificates outstanding, including plaintiff, none of whom joined with plaintiff or have made any complaint at any time. All of these remaining beneficiaries have been paid in accordance with their certificates up to date.

[fol. 140] Wherefore, petitioners respectfully urge that a rehearing may be granted and that the mandate of this Court may be stayed pending the disposition of this Petition.

Respectfully submitted, Brotherhood of Locomotive Firemen & Enginemen, David B. Robertson, Timothy Shea, Albert Phillips, by Thos. Stevenson, Their Attorney.

I, Thomas Stevenson, of Cleveland, Ohio, an Attorney regularly admitted to practice in the United States Circuit Court of Appeals for the Sixth Circuit, do certify that in my opinion the foregoing Petition for Rehearing is well founded and is not presented for the purpose of creating a delay.

Thos. Stevenson.

April 4th, 1934.

[fol. 141] In United States Circuit Court of Appeals

[Title omitted]

Affidavit of Defendant David B. Robertson

David B. Robertson, being first duly sworn, deposes and says that he is one of the defendants in the above entitled cause, that he is President of the defendant Brotherhood of Locomotive Firemen and Enginemen and that he makes this affidavit for the purposes and for use in the above entitled cause.

Affiant states that, under his official interpretation, as President, of the action of the last Convention of the defendant Brotherhood affecting the Widows' Pension Department, none of the funds of said Department have been disbursed except for the operation of said Department and in payments to and settlements with the matured Certificate [fol. 142] holders in the Department; that all of the funds of the said Department, as testified by him at the hearing of the case, will be devoted first to the satisfaction of the claims of the matured Certificate holders and that the interpretation placed by him, as President, upon the aforesaid action of the Convention affecting the Widows' Pension Department, is the law of the Brotherhood unless and until reversed by an ensuing Convention.

And further affiant saith not.

D. B. Robertson.

State of Ohio,
Cuyahoga County, ss:

Before me, a Notary Public in and for said County and State, personally appeared the above named David B. Robertson, who acknowledged that he executed the foregoing affidavit and that the facts contained therein are true, as he verily believes.

Wm. H. Liffiton, Notary Public. My commission expires June 1, 1936. (Notarial Seal.)

Dated March 31st, 1934.
My commission expires: ——
W. H. Liffiton, Notary Public.

[fol. 143] In United States Circuit Court of Appeals

[Title omitted]

Supplementary Affidavit of Defendant Albert Phillips

Albert Phillips, being first duly sworn, deposes and says that he is one of the defendants in the above entitled cause, that he is General Secretary and Treasurer of the defendant Brotherhood of Locomotive Firemen and Enginemen and that he makes this affidavit for the purposes and for use in the above entitled cause.

Affiant states that since the time of making the affidavit in this cause dated January 27, 1933, attached to and filed with the Motion to Dismiss Appeal filed in this cause, showing Eighteen (18) widows remained on the Pension Roll including plaintiff, additional widows have accepted the proffered settlement of $1500.00 and have executed releases [fol. 144] in full of all claims under their Widows' Pension Certificates.

Affiant states that since January 27th, 1933, and prior to the oral argument in this case in December, 1933, Thirteen (13) additional widows had accepted settlements and executed releases leaving Five (5) widows on the Pension Roll and that, at the time of making this affidavit there remain Five (5) widows on the Pension Roll, including plaintiff.

Affiant further states that each of the Five (5) widows who has declined settlement, including plaintiff, has been and is being paid monthly benefits in accordance with the terms of her Certificate.

And further affiant saith not.

Albert Phillips

STATE OF OHIO,
Cuyahoga County, ss:

Before me, a Notary Public in and for said County and State, personally appeared the above named Albert Phillips, who acknowledged that he executed the foregoing affidavit and that the facts contained therein are true, as he verily believes.

Nelle Emsley, Notary Public. My commission expires Nov. 8, 1935. (Notarial Seal.)

Dated March 31st, 1934.

[fol. 145] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—Filed April 10, 1934

The petition for rehearing of this cause is hereby denied.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 146] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 4, 1934.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,636. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 32. Brotherhood of Locomotive Firemen and Enginemen, David B. Robertson, Timothy Shea and Albert Phillips, Petitioners, vs. Ella E. Pinkston. Petition for a writ of certiorari and exhibit thereto. Filed May 9, 1934. File No. 32, O. T., 1933.

FILE COPY

MAY 9 1934

In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. [redacted] 32

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,
Petitioners,

vs.

ELLA E. PINKSTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Sixth Circuit, and

BRIEF IN SUPPORT OF PETITION.

THOMAS STEVENSON,
Guarantee Title Bldg.,
Cleveland, Ohio,
Attorney for Petitioners.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. .....

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,
Petitioners,

vs.

ELLA E. PINKSTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice, and Associate Justices of the Supreme Court of the United States:—

Ella E. Pinkston, Respondent, is the designated beneficiary in a matured Widow's Pension Certificate issued to her deceased husband by the Brotherhood of Locomotive Firemen and Enginemen. The Certificate is contingent by its terms as it provides for monthly payments for life provided the beneficiary does not remarry. Should she remarry the payments cease. Respondent brought suit in Equity against your Petitioners in the District Court of the United States for the Northern District of Ohio, Eastern Division, praying for a Receiver, a Declaration of Trust, an accounting and an injunction. The case was tried before the Hon. Samuel H. West who entered an Order dismissing the case on the ground of no jurisdiction on the part of the Court.

From this judgment and Order the Respondent appealed to the United States Circuit Court of Appeals for

the Sixth Circuit. That Court entered a final decision on the 8th day of March, 1934, reversing the Decree of the District Court. A Petition for Rehearing was denied on April 10th, 1934. Your Petitioners pray for a Writ of Certiorari and review of the Order and Decree of the United States Circuit Court of Appeals for the Sixth Circuit, entered as aforesaid, a certified copy of the record and proceedings whereof we are filing and presenting herewith.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The Petitioner, Brotherhood of Locomotive Firemen and Enginemen, is a voluntary association of men employed as locomotive firemen and enginemen, a hazardous occupation, and is a labor union. It operates and has operated several departments in the nature of fraternal benefit societies, one of which was designated the Widow's Pension Department, which was operated as a separate, self-contained Department from January 1st, 1926 up to July 31st, 1931.

The Certificates provide that, upon the death of the member, the beneficiary (widow or widowed mother) is entitled to receive from the Funds of the Department a Pension of $35.00 per month during her life time,

> "provided she does not remarry. Should she remarry, the payment of such pension shall cease."

An actuarial study of the Department and its experience, made in 1930, disclosed it was only about Five Per Cent (5%) solvent. At that time there were over 6,000 members paying dues into the Department and about 78 widows or widowed mothers holding matured Certificates and in receipt of benefits. Assets in the Department were about $313,000.00 while the liabilities on account of claims then being paid amounted to over $327,000.00.

In view of that experience and the degree of insolvency it was resolved by the Brotherhood at its Convention in June and July, 1931, to discontinue the Department as of August 1st, 1931. The same Convention established a new Benevolent Fund, compulsory upon all members of the Brotherhood, about 80,000 at that time. Briefly stated, the action of the Convention was that the President and General Secretary and Treasurer undertake to make lump sum settlements with each matured Certificate holder, not to exceed $1500.00; where the beneficiary declined such settlement the monthly allowance was to be paid from the new Benevolent Fund provided these monthly payments must continue under the Insurance Laws of the states and that, after such settlements had been made, any remaining assets be distributed to the members of the Department. The President of the Brotherhood, by authority of its Constitution, interpreted this action to mean that the widows would first be settled with out of the Fund before anything else was done. (R. 42, 43.)

To proceed to carry out the resolution of the Convention a communication was sent to each beneficiary on July 31, 1931, advising of the action of the Convention and making certain inquiries. The respondent, a beneficiary, failed to answer and refused to give the Brotherhood any information. She did not advise that she had not remarried nor did she so allege in her original petition, filed September 29th, 1931. Furthermore, it is not specifically and directly alleged in the petition that the value of the matter in dispute is in excess of $3,000.00 exclusive of interest and costs, but only "as hereinafter shown." Plaintiff thereafter alleges and shows that she is entitled to receive $35.00 per month for life *as long as she remains unmarried*; that she is forty (40) years of age and that, based upon her *life expectancy*, her claim has a net present value in excess of $5,000.00.

The District Court held that, as future payments are contingent upon respondent remaining unmarried they may never accrue and therefore the present value of her life expectancy does not represent the amount in controversy. By no possibility could she recover judgment for such a sum. The Court found as a fact that the matter in controversy does not exceed the sum or value of $3,000 exclusive of interest and costs and as a conclusion therefrom that it had no jurisdiction.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. In reversing the Decree of the District Court the Circuit Court of Appeals has decided a question of Federal jurisdiction in a way which we submit is in conflict with applicable decisions of this Court. It has been uniformly held by this Court that the requirements for jurisdiction in a Federal Court are strictly applied. Jurisdiction must clearly appear. All doubts must be resolved against the jurisdiction of the Federal Court as the Judiciary Act was intended to contract the jurisdiction. *Elgin v. Marshall*, 106 U. S. 578; *Wright v. Mutual Life Insurance Company*, 276 U. S. 602.

2. In reversing the Decree of the District Court the Circuit Court of Appeals has decided an important question of general law in conflict with the weight of authority and the established rule. The rule with respect to reckoning future claims or demands to acquire jurisdictional amount is stated in 1 *Cyc. of Fed. Proc.*, Sec. 66 as follows:

> "While future claims and demands, which are contingent in nature and may never accrue can not be reckoned, the controversy embraces future increase or augmentation of the claim or dispute presently made, which will occur in the ordinary course of things."

The remarriage of the plaintiff is not a contingency which is bound to occur in the ordinary course of things. It is a contingency within the volition of the plaintiff. Future payments are not definite and certain but are contingent upon an exercise of the volition of the plaintiff herself. Should the plaintiff choose to remarry, that act in itself would terminate her right to payment. Under the rule stated, the contingent future claims of plaintiff cannot be reckoned.

3. There are special and important reasons why the Writ prayed for should be allowed. The sole question involved, "may future contingent payments be reckoned to acquire the jurisdictional amount," has not been decided by this Court nor by a Circuit Court of Appeals. The decision of the Circuit Court of Appeals in the instant case is probably untenable. This important question should be settled by this Court.

WHEREFORE, your Petitioners pray that a Writ of Certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify the above stated cause to this Court for review and determination, as provided by law, and that your Petitioners may have such other and further relief in the premises as to the Court may appear proper.

Respectfully submitted,

THOMAS STEVENSON,

Attorney for Petitioners.

AFFIDAVIT.

STATE OF OHIO,
CUYAHOGA COUNTY, SS:

THOMAS STEVENSON, being first duly sworn says that he is Attorney for the within named Petitioners; that he has read the foregoing Petition and that the facts stated and allegations contained therein are true, as he verily believes.

THOMAS STEVENSON.

Sworn to before me and subscribed in my presence this 5th day of May, 1934.

HAROLD C. HEISS,
Notary Public.

My commission expires May 29, 1934.

I do hereby certify that I prepared and have examined the foregoing Petition for Writ of Certiorari and that in my opinion such Petition is well founded and should be granted by this Honorable Court, and that said Petition is not filed for delay.

Dated this 5th day of May, 1934.

THOMAS STEVENSON.

In the Supreme Court of the United States

OCTOBER TERM, 1933.

No.....

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,
Petitioners,

vs.

ELLA E. PINKSTON,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The Respondent, (plaintiff below) is the designated beneficiary in a matured Widow's Pension Certificate issued to her deceased husband by the Brotherhood of Locomotive Firemen and Enginemen. By the terms of the Certificate the promised benefits are contingent, being payable only so long as she does not remarry. It is a condition of the Certificate that, if she remarries, payments shall cease.

Being advised by an Actuary that the Widow's Pension Department was only about Five Per Cent (5%) solvent the Brotherhood, in Convention, resolved to discontinue it as of August 1, 1931. The Convention also outlined the manner of disposing of the assets and liabilities of the Department.

At the date of discontinuance of the Department there were about 78 outstanding matured Certificates. Although future payments under these certificates were contingent upon the beneficiaries not remarrying, the Convention pro-

vided that lump sum settlements might be made with the beneficiaries in an amount not to exceed $1500.00.

While August 1st, 1931 was fixed by the Convention as the date of discontinuance, the Brotherhood officers distributed payments for that date. They then proceeded to negotiate with the beneficiaries for lump sum settlements. Every beneficiary with the exception of the plaintiff responded to these proposals. As negotiations for settlements were in progress and the Brotherhood officers confidently expected to consummate settlements with most if not all of the beneficiaries, checks were not sent out on September 1st. Making no response to the inquiries of the Brotherhood the plaintiff filed her suit on September 29th, 1931. The plaintiff failed to advise the Brotherhood that she was still unmarried.

The plaintiff undertakes to bring this suit on her own behalf and on behalf of all other holders of Widow's Pension Certificates similarly situated. No other Certificate holder joined with her at any time. In the Petition, the value of the matter in dispute is not directly and specifically alleged but it is stated that such value "as hereinafter shown" is in excess of $3,000.00 exclusive of interest and costs. (R. 2.) Although plaintiff alleges that she is entitled to a payment of $35.00 per month as long as she should not remarry she did not allege that she had not remarried. That allegation was made by amendment by interlineation by leave of Court on November 28th, 1931. (R. 3.) The bases of the Complaint are (1) the failure to make payment, (2) that the settlements which had been consummated were wrongful, (3) that further wrongful lump sum settlements were contemplated, and (4) that the defendant was about to wrongfully divert the fund.

During the course of the trial in the District Court, in the argument of the case, counsel for plaintiff not only withdrew their objections to the settlements that were made

and proposed but, when it was pointed out by the Court that every settlement increased the value of their claim, they affirmatively consented to the settlements. (R. 111.) At the time this case was reached for argument in the Circuit Court of Appeals, and following the foregoing consent to settlements on behalf of the plaintiff, all except five (5) of the holders of matured Certificates, of whom the plaintiff is one, had accepted the proposed settlements. (R. 144.) Furthermore, each of the five remaining widows, including plaintiff, has been paid monthly benefits from the Widow's Pension Fund in accordance with the terms of her Certificate up to the date of that affidavit, March 31, 1934. (R. 144.)

The District Court held, in a Memorandum Opinion (R. 99) that, as future payments are dependent on the condition that plaintiff remains unmarried and that this is not a contingency that is bound to occur in the ordinary course of things, the future claims could not be reckoned. On Motion for Rehearing that Court rendered another Memorandum Opinion (R. 103) in which the Court considered the case of *Thompson v. Thompson,* 226 U. S. 551 (relied on by the Circuit Court of Appeals), but adhered to its view that it had not jurisdiction.

POINT I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS HOLDING THAT THE JURISDICTIONAL AMOUNT IS INVOLVED IS CONTRARY TO THE WEIGHT OF AUTHORITY AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

It has been uniformly held by this Court in a long and unbroken line of decisions that the requirements for jurisdiction in a Federal Court are strictly applied. Jurisdiction must clearly appear. All doubts must be resolved against the jurisdiction of the Federal Court as the Judi-

ciary Act was intended to contract the jurisdiction. A leading case to this effect is *Elgin v. Marshall,* 106 U. S. 578. In that case are given the reasons for the rule of strict construction.

These rules have universally been followed by the Circuit Courts of Appeals. A recent example is the case of *Wright v. Mutual Life Insurance Company,* 19 Fed. (2d) 117, affirmed in a Memorandum Opinion by this Court in 276 U. S. 602. That decision is applicable to the case at bar.

In the *Wright* case, an insurance policy was involved which provided payment to the beneficiary of $30.00 per month for life and for twenty years in any event. It provided for double that amount in the event of accidental death. The beneficiary claimed the insured met with an accidental death and that double benefits were due. This was denied by the Company and suit instituted in the State Court.

The Insurance Company removed the case to the Federal Court which assumed jurisdiction on the ground that, while the Company admitted liability for $30.00 per month, any decision would determine payment of an additional $30.00 per month for 20 years, an amount in excess of the jurisdictional requirement.

The case was appealed to the Circuit Court of Appeals for the Fifth Circuit where the jurisdiction of the Federal Court was again challenged. The Circuit Court of Appeals reversed the District Court holding that the collateral effect of the judgment on the additional amount was not the test of jurisdiction. As stated, that decision was affirmed by this Court upon authority of *Elgin v. Marshall, supra,* and other cases.

In the case at bar the District Court considered the *Wright* case in point. Where there is a doubt that the jurisdictional amount is involved, such doubt should be resolved against the jurisdiction. We submit that the rule affirmed by this Court in the *Wright* case is controlling.

POINT II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS HOLDING THAT THE CONTINGENT FUTURE PAYMENTS MAY BE TAKEN INTO ACCOUNT IN DETERMINING THE VALUE OF THE MATTER IN CONTROVERSY IS CONTRARY TO THE WEIGHT OF AUTHORITY AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

It is made quite clear by the opinion of the Circuit Court of Appeals (R. 131) that jurisdiction hinges solely upon the value of the individual right of the plaintiff. The Court specifically states that the matter in controversy is not the accumulated Pension Fund nor the combined claims of all holders of matured certificates. There is no challenge of the rule stated in 1 *Cyc. of Fed. Proc.*, Sec. 66, "future claims and demands, which are contingent in nature and may never accrue cannot be reckoned." The decision of the Court that the contingent future claims in this case can be taken into account to secure jurisdictional amount is based solely upon one decision of this Court, *Thompson v. Thompson,* 226 U. S. 551. That decision was considered by the trial court who held it not applicable. The Circuit Court of Appeals holds it is controlling. We respectfully submit it is distinguishable from the case at bar and is not a departure from the general rule.

In the *Thompson* case the matter in controversy was a Decree for Statutory maintenance requiring the husband to pay the wife $75.00 per month. Jurisdiction was challenged as future payments would have to be reckoned to acquire the jurisdictional amount. This Court points out that statutory maintenance is subject to be modified from time to time or even cut off entirely in the event of a change in the circumstances of the parties, but then pointedly says, with respect to payments provided by a court decree:

> "Nevertheless, such a decree clearly and *finally settles* the obligation of the husband to contribute to the support of the wife and offspring, and *fixes* the amount of contribution required for the present to fulfill that obligation. The future payments are *not* in any proper sense contingent or speculative although they are subject to be increased, decreased, or even cut off, as just indicated." (Italics ours.)

By that holding, this Court specifically took that case outside the rule with respect to contingent future payments. As the future payments were "fixed" by the Court's Decree, this Court held they were not in any proper sense contingent or speculative. Even though the future payments were subject to modification, there was no qualification of the right to the payment and no act of the wife nor any changed circumstances would, by their own force, affect the payment which had been "fixed."

The clear distinction in the case at bar which renders the *Thompson* case inapplicable is, that the right to future payments under the Certificate is not "fixed." The right to payments is qualified by the terms of the Certificate, being subject to the condition precedent that the Beneficiary shall not remarry. It is specifically provided that, if she remarries, "payment shall cease." The changed condition brought about by remarriage, which act is solely within the volition of the plaintiff, in and of itself defeats the right to any future payments. With such a condition we submit that the future payments are not "fixed."

POINT III.

THERE IS NO DECISION OF THIS COURT NOR OF A CIRCUIT COURT OF APPEALS DECIDING THE QUESTION AS TO WHETHER OR NOT FUTURE CONTINGENT PAYMENTS MAY BE RECKONED TO ACQUIRE THE REQUISITE JURISDICTIONAL AMOUNT.

We have been unable to find any decision of this Court or of a Circuit Court of Appeals directly deciding the question as to whether or not contingent future payments may be reckoned in order to acquire the requisite amount to confer jurisdiction in the Federal Court. The *Thompson* case, *supra,* is not in point as this Court held the future payments therein were not contingent or speculative but were fixed. By relying on that case the Circuit Court erred in the case at bar, unless it held the payments are not contingent despite the plain contingency with respect to remarriage.

If contingent future payments may be reckoned to acquire the jurisdictional amount it is to be anticipated that many cases on insurance policies, providing for future payments contingent upon continued disability, will clog the federal court dockets. The duration of the disability is obviously speculative and impossible of definite determination. Even more speculative is the possible date of remarriage of plaintiff in the case at bar, as the event is within her volition. Such a holding would appear to be in derogation of the rule of strict construction under which, in cases where the judgment will work an estoppel as to amounts greatly in excess of the jurisdictional amount, jurisdiction has been repeatedly denied because the effect is collateral, as in the *Wright* case, *supra.* In the general interest this important question should be settled by this Court.

CONCLUSION.

We, therefore, respectfully submit that a Writ of Certiorari should be granted to review the decision of the United States Circuit Court of Appeals for the Sixth Circuit because of the importance of the question involved which has not been decided heretofore; because the decision is contrary to the weight of authority, in conflict with applicable decisions of this Court and is probably untenable.

Respectfully submitted,

THOMAS STEVENSON,

Attorney for Petitioners.

PETITIONERS' BRIEF

FILE COPY

SEP 17

In the Supreme Court of the United States

OCTOBER TERM, 1934.

No. 32.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,

Petitioners,

vs.

ELLA E. PINKSTON,

Respondent.

BRIEF OF PETITIONERS.

THOS. STEVENSON,
Guarantee Title Bldg.,
Cleveland, Ohio,
Counsel for Petitioners.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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No. 32.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,

Petitioners,

vs.

ELLA E. PINKSTON,

Respondent.

BRIEF OF PETITIONERS.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 69 Fed. (2) 600 and is found in the Transcript of Record at page 113. The opinions of the United States District Court for the Northern District of Ohio, Eastern Division, are not reported but are found in the Transcript of Record at pages 93 and 96.

JURISDICTION.

This cause is before this Court as a result of a Petition for Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, granted by this Court; 54 Sup. Ct. Rep. 866. The date of the judgment to be reviewed is March 8th, 1934.

STATEMENT OF THE CASE.

The Petitioner, Brotherhood of Locomotive Firemen and Enginemen, is a voluntary association of men employed as locomotive firemen and enginemen, a hazardous occupation, and is a labor union. It operates and has operated several departments in the nature of fraternal benefit societies, one of which was designated the Widow's Pension Department. The Constitution of the Brotherhood provided that the Department should be self-sustaining, should be entirely separate from all others and should in no way create a financial liability for any other Department. (R. 75.) The Department was so operated from January 1st, 1926 up to July 31st, 1931.

The Certificates issued by the Widow's Pension Department provided that, in the event of the death of the member, his widow shall be entitled to the benefits set forth in such Widow's Pension Department. (R. 66.) As benefits, the Widow's Pension Department provided that the beneficiary "shall be entitled to receive from the funds of this Department a pension of Thirty Five Dollars ($35.00) per month during her life time, provided she does not remarry. Should she remarry, the payment of such pension shall cease." (R. 77.)

An actuarial study of the Department and its experience, made in 1930, disclosed it was only about Five Per Cent (5%) solvent. At that time, there were about 6,000 members paying dues into the Department and about 78 beneficiaries holding matured certificates and in receipt of benefits. Assets in the Department were about $313,000.00 while the liabilities on account of claims then being paid amounted to over $327,000.00.

In view of that situation it was resolved by the Brotherhood at its Convention in June and July, 1931, to discontinue the Department as of August 1st, 1931. Briefly stated, the action of the Convention was that the Presi-

dent and General Secretary and Treasurer undertake to make lump sum settlements with each matured Certificate holder, not to exceed $1500.00; where the beneficiary declined such settlement the monthly allowance was to be paid from the new Benevolent Fund provided the monthly payments must continue under the Insurance Laws of the states and that, after such settlements had been made, any remaining assets be distributed to the members of the Department. The same Convention established a new Benevolent Fund, compulsory upon all members of the Brotherhood, about 80,000 at that time.

The President of the Brotherhood is given authority by its Constitution to interpret the provisions thereof, such interpretation being made final unless modified or reversed by the ensuing Convention. (R. 37.) The President interpreted the action of the Convention to mean that widows would first be settled with or provision made to take care of the matured claims out of the fund before anything further was done. (R. 39.)

In proceeding to carry out the resolution of the Convention, a communication was sent to each beneficiary on July 30th, 1931, advising of the action of the Convention and making certain inquiries. (R. 68.) The respondent, a beneficiary, failed to answer the communication and refused to give the Brotherhood any information. A copy of the letter was sent to the respondent on September 10th, 1931 (R. 85), and the response was a conference with her attorneys and the filing of the Bill of Complaint herein on September 29th, 1931.

The Bill of Complaint does not directly and specifically allege the jurisdictional amount. An attempt is made in Par. 2 of the Complaint (R. 1) but the weakness and defect in the allegation is readily apparent. The allegation is "that the value of the matter in dispute herein *as hereinafter shown* is in excess of $3,000, exclusive of interest and

costs." This allegation obviously requires additional allegations to be made and considered from which a conclusion can be reached as to the value of the matter in dispute. In fulfillment of this requirement it is thereafter alleged that plaintiff is entitled to receive a pension of "$35.00 per month during her lifetime, and *as long as she should not remarry*" (R. 3); that she is 40 years of age and that, based upon her life expectancy, her claim has a net present value in excess of $5,000. (R. 5.)

It may here be noted that, in the Complaint originally filed, there was no allegation that complainant had not remarried. To conform to the condition pleaded that payments continue only so long as the beneficiary remains unmarried, this essential allegation was supplied only after a ruling of the District Court on the defendant's Motion to Dismiss the Bill. (R. 3, 13.)

As indicated, the defendant interposed a Motion to Dismiss the original Bill of Complaint. This was predicated on two grounds (1) misjoinder of parties, and (2) that the Bill did not state facts sufficient to constitute a valid cause of action in equity. (R. 10.) This Motion was overruled by the District Court said court pointing out that the lack of the essential allegation that the plaintiff had not remarried had been covered by an amendment. (R. 13.) The case was then heard on the merits and, at the opening of the hearing, the defendant immediately raised the question that the jurisdictional amount was not involved. The Court held that question had been ruled upon in its refusal to dismiss the Bill of Complaint. (R. 26.)

The plaintiff undertook, through the testimony of an actuary, to prove the value of her individual claim. (R. 33.) No competent testimony was introduced as the opinion or estimate of the actuary as to the present value of the claim of the plaintiff was based entirely upon her life

expectancy and did not take into consideration the condition that the annuity would terminate in the event the plaintiff remarried. (R. 34.) At the close of the plaintiff's case the defendant renewed the Motion to Dismiss on failure of proof which was overruled by the Court. (R. 35.) The defendants renewed their Motion for a verdict at the close of the hearing which was overruled. (R. 65.)

Briefs were then filed on consideration of which the District Court dismissed the cause without prejudice in a Memorandum Opinion. (R. 93.) A Motion for a Rehearing was filed, the matter again briefed and the District Court adhered to its former view it had not jurisdiction in another Memorandum Opinion. (R. 96.)

The plaintiff appealed the case to the United States Circuit Court of Appeals for the Sixth Circuit. That Court reversed the Decree of the District Court and remanded the cause back for further proceedings. (R. 113.)

As the plaintiff had undertaken to bring the case as a class or representative action, the Circuit Court of Appeals, in its decision, specifically held that the matter in controversy is the value of the individual rights of the plaintiff under her individual certificate and is not the accumulated Pension Fund nor the combined claims of all the holders of matured Certificates. (R. 114.) The decision of the Circuit Court of Appeals reversing the case is based solely on one decision of this Court which is held to be controlling. *Thompson v. Thompson,* 226 U. S. 551. (R. 115.) An additional factual situation might here be referred to. The Defendant filed a Petition for Rehearing in the Circuit Court of Appeals. (R. 116.) In connection with that Petition for Rehearing one of the defendants, the General Secretary and Treasurer of the defendant Brotherhood filed an affidavit to the effect that, with the exception of five (5) widows, of whom the plaintiff was one, all the holders of matured Certificates had made settlement of

their claims. The affidavit also stated that each of the five (5) remaining widows, including plaintiff, had been and is being paid monthly benefits in accordance with the terms of the Certificate which she holds.

On that state of facts and, as the plaintiff was receiving and accepting all payments due her under her Certificate it was represented by defendant that the case had become moot and on that ground should be dismissed by the Court. In its decision, the Circuit Court held that the controversy had not become moot (R. 116), and the Petition for Rehearing was denied. (R. 122.)

SPECIFICATION OF ERRORS.

The issue in this case is well defined and may be stated as follows: Where a Complainant (widow) 40 years of age, with a life expectancy of twenty-six (26) years, is the holder of a Pension Certificate providing payment of Thirty Five Dollars ($35.00) per month for life, providing she does not remarry (payment to cease if she remarries), may such future contingent payments be reckoned during life expectancy in order to confer jurisdiction on the Federal Court?

The District Court held such future contingent payments cannot be reckoned and that it was without jurisdiction. The Circuit Court of Appeals reversed that holding, ruling that the decision of this Court in *Thompson v. Thompson,* 226 U. S. 551, is controlling. We believe that the Circuit Court erred in holding that decision to be controlling and misconstrued the purport of the decision.

While the argument in this brief will be addressed to the foregoing question we submit the Circuit Court of Appeals also erred in holding that the case had not become moot.

SYNOPSIS OF ARGUMENT.

The amount necessary for federal jurisdiction cannot be predicated on future claims which are contingent in nature and may never accrue. The decision of this Court relied upon to sustain jurisdiction in the case at bar specifically holds that the future payments therein provided by a court order were not contingent, but fixed. In a matured Pension Certificate, entitling the widow beneficiary to receive a pension of Thirty Five Dollars ($35.00) per month during her life time, provided she does not remarry, all payments are contingent. Future payments depend entirely upon the volition of the beneficiary and may never accrue. The probability of remarriage cannot even be conjectured and it is impossible to estimate the present value of such contingent payments. Being predicated upon a stated contingency, the happening of which will automatically terminate the right to payments, future payments under such a Pension Certificate cannot be considered or reckoned for the purpose of acquiring the jurisdictional amount.

ARGUMENT.

The sole jurisdictional question in this case and now before this Court is clearly defined by the Opinion of the Circuit Court of Appeals. As the plaintiff was urging additional grounds as the basis of the jurisdiction of the Federal Court, such as the amount of the accumulated Pension Fund and the combined claims of all the holders of matured Certificates, the Circuit Court eliminated those contentions by specifically holding that neither of those matters constitute the matter in controversy. This was on the authority of *Lyon Bonding Company v. Karatz,* 262 U. S. 77. The Court then stated that the rights which Appellant seeks to have protected, that is, her rights under the Certificate which she holds, is the matter in controversy.

Ordinarily we would not be disposed to challenge or question the statement of facts made by opposing counsel but, by reason of the errors and omissions in the Statement of the Case in the brief of Respondent opposing the Petition for Writ of Certiorari, it would appear fitting they now be pointed out in order that we will not be placed in the position of oppearing to acquiesce by silence. While it may not be of any materiality, counsel for plaintiff state on page 4 of their brief

> "Notwithstanding that the Petitioners had failed in their answer or otherwise to raise *any* jurisdictional question, the District Court, *of its own initiation,* after hearing the case on its merits, ruled that the amount in controversy was less than $3,000, and thereupon dismissed the case for want of jurisdiction, etc." (Italics ours.)

Even if of any moment in view of Judicial Code, Sec. 37; 28 U. S. C. A. Sec. 80; 36 Stat. 1098, such a sweeping statement is at variance with the record as outlined in the foregoing statement of the case. The defendants filed a Motion to Dismiss (R. 10), in their Answer specifically denied the allegations of Par. 2 of the Complaint attempting to allege the value of the matter in dispute (R. 14), in their opening statement raised the question of jurisdictional amount which the Court stated had been passed upon (R. 26) and renewed the Motion to Dismiss at the end of plaintiff's testimony. (R. 35.) In view of such a record it is difficult to see how counsel can seriously make the statement that Petitioners had failed "in their answer or otherwise to raise *any* jurisdictional question" and that the District Court dismissed the case of its own initiative.

On the same page of their brief counsel for respondent suggest that the following statement contained in the Petition for Writ of Certiorari is misleading.

> "The court found as a fact that the matter in controversy does not exceed the sum of $3,000."

In answer we simply refer to the precise language of the Order of the District Court dismissing the case (R. 99) where the language is used:—

> "And the Court *now finding as a fact* that the matter in controversy does not exceed the sum or value of $3,000 exclusive of interest and costs and as a conclusion therefrom that it has no jurisdiction hereof etc." (Italics ours.)

In addition to this precise language of the Order reference might also be made to the Assignment of Errors filed by Respondent in which the first assignment (R. 108) is:—

> "that the Court erred in *finding as a fact* that the matter in controversy does not exceed the sum or value of $3,000.00 exclusive of interest and costs." (Italics ours.)

The literal effect of the decision of the Circuit Court of Appeals in this case is that the benefits provided for in the Certificate are not contingent and therefore the decision of this Court in *Thompson v. Thompson, supra,* is controlling. If this is the correct meaning, it calls for a consideration of the precise language of the Constitution of the Brotherhood controlling the benefits as provided by the Certificate. It is there provided that a beneficiary

> "shall be entitled to receive from the funds of this department a pension of Thirty Five Dollars ($35.00) per month during her lifetime, provided she does not remarry. Should she remarry, the payment of such pension shall cease." (R. 77.)

Obviously, this language does not provide for unconditional payments. The right to *any* payment is circumscribed by a condition. The beneficiary is entitled to a payment only "provided she does not remarry." Manifestly, if she remarried immediately after the death of her husband she would not be entitled to any payment.

It may be argued that the concluding sentence "should she remarry, the payment of such pension shall cease" is a defeating clause, but we submit it has no bearing upon the *right* of the beneficiary to payment. It is merely a provision that the named beneficiary alone has the conditional right to payment and that, when she has no further right to payment, there is no other claim against the fund under the Certificate.

It is with great diffidence we approach a discussion of the opinion of the Circuit Court of Appeals. That Court, however, brought the decision to one well defined point by first carefully excluding from consideration either the accumulated Pension Fund or the combined claims of all matured Certificate holders. The Court held that jurisdiction of the Federal Court rested solely upon the Respondent's right under the Certificate which she holds. The Court could not well do otherwise in view of former decisions.

In the case of *Eberhard, et al. v. Northwestern Mutual Life Insurance Co.,* 241 Fed. 353, an almost identical situation was presented for the consideration of the Circuit Court of Appeals for the Sixth Circuit. The Court there held that neither the accumulated fund nor the aggregate amount of the claims of the several complainants were the test of jurisdiction. The individual plaintiff must bring into court an amount in excess of $3,000.

That case was cited with approval by this Court in *Lyon Bonding and Surety Company v. Karatz,* 262 U. S. 77. In that case an almost identical situation on the question of jurisdictional amount was presented to this Court. Plaintiff's claim against the company was $2100.00 and this Court held that the District Court was without jurisdiction as the requisite amount was not involved.

Although this suit is founded on the Certificate there is no prayer for recovery. It is not an action for damages

for the breach of the Certificate. As a matter of fact, at the time of the trial in the District Court as well as at the time of the hearing in the Court of Appeals the Respondent had been paid up to date under her Certificate, and had accepted such payments, upon her allegation that she had not remarried. It is an action in equity seeking relief in the nature of specific performance. Nevertheless, under the Opinion of the Circuit Court of Appeals, it is the value of complainant's rights under her Certificate which must constitute the jurisdictional amount.

Although any and all rights under the Certificate are conditional, being predicated on the provision that she does not remarry, the Circuit Court held these payments were not contingent or speculative upon the sole authority of *Thompson v. Thompson, supra.* In that case, in a separate maintenance suit, the Supreme Court of the District of Columbia directed the husband (defendant) to pay $500.00 counsel fees and $75.00 a month for the maintenance of his wife and child. The Court of Appeals of the District reversed the decree and the wife appealed to this Court. The husband (defendant) contended this Court lacked jurisdiction because it could hear only causes in which the matter in dispute, exclusive of costs, exceeded the sum of $5000.00. At the time the case was decided the accrued payments did not amount to the necessary $5,000 but this Court held that, considering the expectancy of the lives of the parties, the prospective payments were sufficient to make up the jurisdictional amount.

Obviously, in that case, jurisdiction depended entirely upon the determination of the question as to whether or not the monthly payments for maintenance of the wife and child provided for under the order of the court, were contingent. The husband contended that such future payments were contingent for the reason that the court order was

subject to change. In rejecting these contentions this Court said:—

> "Nevertheless, *such a decree* clearly and finally *settles* the obligation of the husband to contribute to the support of the wife and offspring, and *fixes* the amount of contribution required for the present to fulfill that obligation. *The future payments are not in any proper sense contingent or speculative,* although they are subject to be increased, decreased, or even cut off as just indicated." (Italics ours.)

We submit that the very necessity for this Court to rule on such a question as presented in that case clearly indicates it to be an exception from a well established rule. The impossibility of estimating the value of future payments terminating upon remarriage had been considered and passed upon by this Court in a matter not bearing upon jurisdiction. This was in connection with proving such claims under the Bankruptcy Act. The leading case appears to be *Dunbar v. Dunbar,* 190 U. S. 340; 23 Sup. Ct. 757; 47 L. Ed. 1084.

In that case, decided in 1903, the divorced husband had entered into an agreement with his divorced wife to pay her an annuity "during her life or until she remarries." The divorced husband subsequently went through bankruptcy and later set up his discharge in bankruptcy as a bar to claims under that agreement. The difficulties of placing any value upon the future claims based upon remarriage are fully discussed. At page 345 this Court said:—

> "But how can any calculation be made in regard to the continuance of widowhood when there are no tables and no statistics by which to calculate such contingency? How can a valuation of a probable continuance of widowhood be made? Who can say what the probability of remarrying is in regard to any particular widow? We know what some of the factors

might be in the question: inclination, age, health, property, attractiveness, children. These would, at least, enter into the question as to the probability of continuance of widowhood, *and yet there are no statistics which can be gathered which would tend in the slightest degree to aid in the solving of the question.*" (Italics ours.)

In further discussion this Court said, page 346:

"Taking the liability as presented by the contract, if the mortality tables were referred to for the purpose of ascertaining the value so far as it depended upon life, the answer would be no answer to the other contingency of the continuance of widowhood; and if, having found the value as depending upon the mortality tables, you desire to deduct from that the valuation of the other contingency, *it is pure guesswork to do it.*" (Italics ours.)

If, as so conclusively shown by this Court, it is impossible to place any value upon future payments based upon the contingency of remarriage for the purposes of a discharge under the Bankruptcy Act, how much less can any attempt be made to place a value on such future payments for the purpose of acquiring federal jurisdiction? The strict rule of construction with respect to jurisdictional amount and the presumption against it requires the amount to be present almost with certainty and not based upon pure guesswork.

We have been unable to find that the doctrine of the *Dunbar* case, *supra,* has been modified in any way by this Court. It was not modified or relaxed by the decision of this Court in the *Thompson* case, *supa.* As a matter of fact, the *Thompson* case was and is clearly distinguished. There was no contingency whatever in the Court Order in the *Thompson* case.

On the other hand, the doctrine of the *Dunbar* case has frequently been followed. In *Shanley v. Herold,* 141

Fed. 423, involving a question of taxation, at page 429 the court said:—

> "The interests in question of the legatees were determinable not only by the death of the widow, but also by her remarriage. It is apparent therefore that the interests might terminate at any time, *and that there is consequently no way to fix or determine their present value.* No tables have ever been calculated which will show the time, when, if ever, a widow will remarry." (Italics ours.)

Again in *Herold v. Shanley,* 146 Fed. 20, in criticizing the use of mortality tables in such a case the court, at page 24 said:—

> "Still further, if the use of mortuary tables were permissible in a proper case, they should not have been used here, for one of the contingencies contemplated by the will was the remarriage of the widow, and, while the probability of death may perhaps be approximately estimated from the recorded experience of insurance companies, *there are as yet no statistics available from which the probability of remarriage may even be conjectured.*" (Italics ours.)

In a still later case, *In re Westmoreland,* 4 Fed. (2d) 602, in discussing the basis for the settlement of a decree for alimony which ran during life and non-marriage the Court, at page 603 said:—

> "She cannot be settled with at once without her consent, because no court can estimate the present value of a right conditioned as hers is."

If there is any stated contingency which will automatically terminate the future payments, it would seem clear that the future payments are positively contingent and speculative. In the *Thompson* case, there was no condition stated in the Court Order which would of its own force defeat the future payments. The contention was that the Court making the Order had the power to amend or

modify it even to the extent of entirely cutting off the payments. It is quite obvious, however, that the payments were as "fixed" as humanly possible. An independent authority must act in order for there to be any change. There was no stated condition that would *ipso facto* terminate payments.

It is difficult to see how that decision can be held controlling of the case at bar. In this case the right to any future payments is predicated upon a clear condition,—"remaining unmarried." This condition is entirely within the volition of plaintiff and she may disqualify herself at any time. The apparent fallacy of the holding that the future payments in the case at bar are *not* contingent or speculative would appear to be fully disclosed if the condition had been fulfilled and the Respondent had actually remarried subsequent to the decision of the District Court and prior to the hearing in the Circuit Court of Appeals. Under such circumstances, could the Court of Appeals have held that the right to future payments, already defeated by the Respondent herself, still rendered the future payments "fixed," under the reasoning of the *Thompson* case?

Furthermore, the ruling of the Circuit Court of Appeals herein is also at variance with the decisions of other Federal Courts, also state courts of last resort in denying Federal jurisdiction in analogous cases. We refer to the cases that have been brought upon insurance policies alleging total and permanent disability where Federal jurisdiction has been sought to be predicated upon future payments during the life expectancy of the insured. The decisions are consistent and unanimous that the alleged future benefits are too speculative to be based on life expectancy, being defeated by recovery, and cannot be reckoned to acquire the jurisdictional amount in the Federal Courts.

LaVecchia v. Conn. Mut. Life Ins. Co. of Hartford, Conn., 1 Fed. Supp. 588;

Wyll v. Pacific Mutual Life Ins. Co. of Calif., 3 Fed. Supp. 483;

Kithcart v. Metropolitan Life Ins. Co.: Kevan v. John Hancock Mutual Life Ins. Co., 1 Fed. Supp. 719;

Reliance Life Ins. Co. v. Capital National Bank, 38 Ga. App. Rep. 349; 143 S. E. 924;

Guardian Life Insurance Co. v. Johnson, 186 Ark. 1019; 57 S. W. (2d) 555;

Fields v. Equitable Life Ins. Co., 199 N. Car. 454; 154 S. E. 738.

It would be a work of supererogation to argue to this Court in support of the rule of strict construction for Federal jurisdiction. There has been no deviation from the rule as announced by this Court in *Elgin v. Marshall*, 106 U. S. 578, that all doubts must be resolved against the jurisdiction of the Federal Courts, as the Judiciary Act was intended to contract the jurisdiction. The case of *Thompson v. Thompson* is not a relaxation of that rule but merely a finding that, under the facts in that case, it came within the rule. The rule was recently re-affirmed by this Court in *Mutual Life Ins. Co. of New York v. Wright*, 276 U. S. 602.

CONCLUSION.

Federal jurisdiction herein rests solely on future payments which are contingent upon the complainant not remarrying. There are no tables or statistics which can be gathered which would aid in establishing the value of such future payments. The probability of remarriage may not even be conjectured. Any attempt to fix a value of such future payments is pure guesswork.

WHEREFORE, in view of the presumption against the existence of federal jurisdiction and the necessity of the jurisdictional amount to affirmatively appear it is respectfully submitted that the judgment of the Circuit Court of Appeals rendered in this cause should be reversed and the judgment rendered by the United States District Court for the Northern District of Ohio, Eastern Division, should be affirmed.

Respectfully submitted,

THOS. STEVENSON,

Counsel for Petitioners.



FILE COPY

OCT 17
CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1934.

No. 32.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,

Petitioners,

vs.

ELLA E. PINKSTON,

Respondent.

REPLY BRIEF OF PETITIONERS.

THOS. STEVENSON,
Guarantee Title Bldg.,
Cleveland, Ohio,
Counsel for Petitioners.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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ELLA E. PINKSTON,

Respondent.

REPLY BRIEF OF PETITIONERS.

It is with reluctance we submit this short Reply Brief. We do so only because we feel it is our duty to the Court, as well as to the client, to see that the exact facts in the case are accurately presented. Even though it may well be that the sole issue in this case is one of jurisdictional amount, if the underlying facts are presented to the Court, they should be treated clearly, fully and accurately.

Opposing counsel have seen fit to emphasize the action of the Convention of the defendant Brotherhood with respect to the termination of the Widow's Pension Department, which is the basis of the Complaint herein. Unless reference is had to the Transcript of Record, however, the half statement in their Brief is completely misleading.

After quoting a recommendation of a Committee of the Brotherhood appearing at R. 82, counsel say on page 3 of their Brief, the following amendment to the report was proposed (R. 73):

> "That the International President and General Secretary and Treasurer be instructed *to make a lump sum settlement, not to exceed $1500.00 for each widow now on the Pension Roll. Widows that refuse to settle will have their names erased from the Pension Roll.*"

It is then stated the report as amended was adopted.

The instructions to the Brotherhood officers is emphasized in the Brief and the quotation ends with a period. Although the Brief states that the report as amended was adopted, it will be noted there is no statement that the quoted amendment was adopted but merely the statement that it was proposed. Standing alone, the foregoing would suggest that the Brotherhood undertook to compel each widow on the Pension Roll to settle for a sum not in excess of $1500.00 and, if any widow refused to so settle, her name would be erased from the Pension Roll and any and all payments to her would terminate. This is not even a fair statement of the facts.

The amendment proposed and adopted by the Convention appears in full at R. 83. It is as follows:

> "That the International President and General Secretary and Treasurer be instructed to make a lump sum settlement, not to exceed $1500.00 with each widow now on the Pension Roll. Widows that refuse to settle will have their names erased from the Pension Roll *and will be paid their monthly allowance* from the Benevolent Fund, providing these allowances must continue under the insurance laws of the States." (Italics ours.)

When this entire amendment is read, an entirely different picture is presented. The Brotherhood, in Convention, a meeting of locomotive firemen, was endeavoring to terminate what they had been advised was an improvident and unsound department. For this purpose they provided for settlements; that widows who refused to settle should have their names erased from the Pension Roll but, in the

same breath, made provision that they would be *paid their monthly benefits* from another fund, providing state insurance laws required it. Granting there may be a question as to the legal right of the Brotherhood to summarily terminate payment from one fund and insist on accepting payment from another fund, under the circumstances presented, no intention is here disclosed to compel the acceptance of an arbitrary settlement at the expense of losing all benefits.

In the action of the Convention with respect to erasing names from the Pension Roll there is not even a comma after that statement. In the same sentence provision is made for *continued payments*. True, the continued payments were under a proviso, but that was for later decision by the officers of the Brotherhood.

The record in this case shows that this proviso was considered by the officers. President Robertson, with ample authority to interpret the Constitution of the Brotherhood and acts of the Convention, testified as follows (R. 39):

> "A. I have counseled with my associates and have said to them that we will not undertake to distribute any of this fund, and that *in so far as the action of the convention is concerned,* we would first undertake to settle with these widows and if we could not settle with them, those that we could not settle with or were not willing to take the $1500, we would undertake to have the value of their annuities appraised and we would undertake to set aside, at least enough money to take care of them. I think that is what the convention contemplated, and I take that conclusion from the fact that an effort was made, as counsel for plaintiff has said, to interpose a motion that we should continue paying the $35 per month, but that motion, if carried, would have continued the widows' pension department itself, and that is the reason it was not adopted. The amendment that was finally adopted was a compromise of that action which provides for discon-

> tinuing the department, and on the other hand for making a settlement with those widows who were not willing to take $1500. That was a fireman's way of expressing it. In discussing it with counsel, I gave the best advice I could to my associates that we would settle with these widows before we would do anything else." (Italics ours.)

From the foregoing it is clear that, not only did the Convention provide for continuing monthly benefits, but the responsible officers of the Brotherhood testified that they would not undertake to distribute any of the fund until settlements had been made with all of the widows or other provision made to take care of their claims out of the particular fund and that such was the proper interpretation of the action of the Convention.

On page 4 of their Brief opposing counsel say that, in conference with officers of the defendant Brotherhood and its general counsel:

> "no mention was made of any alleged interpretation by the President of the Brotherhood in any way *modifying* the action of the Convention."

This is not challenged. No contention is made by the defendant that the President of the Brotherhood made any interpretation "modifying" any action of the Convention. An examination of his testimony on R. pages 38, 39, shows that he discussed the proviso with respect to the meaning of "insurance laws of the states" with counsel and then advised his associates that they would settle with the widows before they do anything else.

On page 11 of their Brief under the title, "QUESTION," opposing counsel state, "Her (Complainant's) individual interest in this fund is $4,650.00." In the first statement of their "Argument," on page 12, the same statement is repeated. It is difficult indeed to find a basis for

such a statement although it will perhaps be contended that such has been conceded by the defendants.

On page 7 of their Brief Respondents quote at some length from the Answer filed by the defendants. The present value of the fund on hand is given, also the average amount to meet these matured claims, $3,700.00. It is stated that settlements had been negotiated with 22 pensioners on a basis of $1500.00 each. It is then stated that "if" the 22 settlements are consummated there will be an average amount in the fund to meet each claim of about $4,650.00, and that the consummation of the 22 settlements would enhance the value of the fund about $100,000 and enhance the average amount on hand for the remaining claims about $950 each. These allegations in the Answer were obviously for the purpose of showing that the proposed settlements were not a detriment to the complainant but would work to her advantage in the event she should not remarry. That would be true of each widow who refused to accept the settlement.

Obviously, those allegations are merely to the effect that the *average amount on hand* to meet the matured claims was $3700.00; that "if" a certain group of 22 widows would make settlements for $1500.00 each the *average amount on hand* for the remaining matured claims would be $4650.00. This is neither a concession nor evidence that the complainant's actual interest was $4,650.00, or any amount.

Although respondent admits (Brief, page 2) that the promised pension of $35 per month is accompanied with the proviso "provided she did not remarry" a somewhat contradictory statement is made on page 14 of their brief. Counsel is arguing that the complainant's payments in this case are as "fixed" as this Court found the payments to be "fixed" in the *Thompson* case, 226 U. S. 551. Counsel then state:

> "She (complainant) has a vested right to continue to collect the $35.00 a month payments as long as she lives. *Nothing* can intervene to defeat this right, except the dissipation of the fund." (Italics ours.)

This statement must surely be a mistake as to the facts in the case at bar. It clearly appears that the payments provided for the Complainant continue only "provided she does not remarry." In the face of this proviso we suggest it cannot well be urged that Complainant is entitled to the payment as long as she lives and that nothing can defeat this right except the dissipation of the fund.

AMOUNT OF FUND AS TEST OF JURISDICTION.

Although the Circuit Court of Appeals squarely held in its Opinion that the matter in controversy is not the accumulated Pension Fund nor the combined claims of all holders of matured certificates, Respondent would apparently have this Court review that holding. Such holding is upon the authority of *Lyon Bonding Company v. Karatz,* 262 U. S. 77. In its decision in that case this Court referred with approval to the case of *Eberhard v. Northwestern Mutual Life Insur. Co.,* 241 Fed. 353.

Counsel seek to distinguish the case at bar from the *Eberhard* case upon the ground that, in the latter case, the defendant was a solvent insurance company, whereas in the case at bar, the allegation is that the society was insolvent. They overlook the fact, however, that in the *Lyon Bonding Company v. Karatz* case the insurance company was insolvent. Clearly the solvency or insolvency of the company has no bearing upon this question of jurisdiction.

An argument is made that, in the case of *Lyon Bonding Company v. Karatz,* where jurisdiction was denied, the Complainant was a simple contract creditor. Although the Complainant herein was the named beneficiary in a

matured Pension Certificate, which had been issued to her deceased husband, counsel say, Brief, page 24:

> "In the instant case neither Complainant nor the other beneficiaries have contracts enforceable at law."

We feel we cannot appear to acquiesce in that statement by silence. Under proper circumstances, the Complainant or any other holder of a similar matured Certificate could institute and maintain an action at law against the Brotherhood, for the recovery of benefits thereunder.

Respectfully submitted,

THOS. STEVENSON,

Attorney for Petitioners.

FILE COPY

In the Supreme Court of the United States

October Term, 1951

No. [redacted] 32

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,

Petitioners,

vs.

ELLA E. PERRY,

Respondent.

BRIEF OF RESPONDENT

Opposing Petition for Writ of Certiorari

JAMES E. GILLESPIE,

Solicitor for Respondent.

W. L. [illegible]

[illegible] Building,

[illegible]

In the Supreme Court of the United States

OCTOBER TERM 1933.

No.....

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,
Petitioners,

vs.

ELLA E. PINKSTON,
Respondent.

BRIEF OF RESPONDENT
Opposing Petition for Writ of Certiorari.

JAMES R. GARFIELD,
Solicitor for Respondent.

W. L. BRYAN,
1401 William-Oliver Bldg.,
Atlanta, Georgia,

GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,
1401 Midland Building,
Cleveland, Ohio,
Of Counsel.

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BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,
Petitioners,

vs.

ELLA E. PINKSTON,
Respondent.

BRIEF OF RESPONDENT
Opposing Petition for Writ of Certiorari.

STATEMENT OF THE CASE.

The sole question in this case is whether or not the amount in controversy is in excess of Three Thousand Dollars ($3000) and accordingly sufficient to permit the Federal District Court to assume jurisdiction.

We shall discuss therefore only those parts of the petitioners' statements which are pertinent to the question of jurisdiction.

Respondent's bill of complaint was filed in the District Court on the equity side, asking for an injunction, accounting and receivership in respect of a trust fund of approximately Three Hundred Thousand Dollars ($300,000). The action was brought by complainant on behalf of herself and all other holders of so-called Widows' Pension Certificates of the Brotherhood of Locomotive Firemen and Enginemen.

The complaint alleged that upon death of her husband complainant-respondent became entitled to a pension of Thirty-five Dollars ($35) a month "during her lifetime, and

as long as she should not remarry''; that this claim was payable out of a fund known as the Widows' Pension Fund of the Widows' Pension Department kept by the Brotherhood separately and apart from its other funds and amounting to approximately Three Hundred Thousand Dollars ($300,000); that complainant was forty (40) years of age and that her rights based upon her expectancy had a net value in excess of Five Thousand Dollars ($5,000); that in August, 1931, the Brotherhood ordered the Department to discontinue all payments to pensioners, stopped all further dues and assessments, and authorized settlement with each pensioner for a sum of Fifteen Hundred Dollars ($1500) in cash; that the trustees of the Fund (the petitioners here) had thereby violated the terms of the trust as set up in the constitution of the Brotherhood (see page 80 of the Record); that the Fund was being diverted to purposes other than those permitted by the constitution and in violation of complainant's contractual rights and was being dissipated.

The prayer (Record, page 7) was as follows:

> ''Complainant prays that a trust in and of the said Widows' Pension Fund of the said Brotherhood of Locomotive Firemen and Enginemen be declared; that the defendants David B. Robertson, Timothy Shea and Albert Phillips be adjudged and declared to be Trustees thereof for Complainant and other widows and widowed mothers of deceased members who are beneficiaries of the said Widows' Pension Department; that said defendants David B. Robertson, Timothy Shea and Albert Phillips be required to account for and with respect to the funds of said Widows' Pension Fund in their custody and control and be enjoined and restrained from making further disbursements from the said fund except under appropriate order of this court; that a receiver be appointed to take charge of, administer and liquidate said fund for the benefit of your Complainant and other beneficiaries in like position and the creditors of the said fund; that the court fix the

priorities of the various claimants in and to the said fund, and Complainant prays for such other and further relief as shall seem meet and proper and as the nature of the case may require."

A motion to dismiss on the grounds of misjoinder and failure to state a cause of action (Record, page 14) was filed and overruled.

The answer (Record, page 18) admits that the fund in question amounting to Two Hundred Seventy Thousand Dollars ($270,000) was held by the Brotherhood separately and apart from its other funds, admits the action of the Brotherhood in abolishing the Department virtually as alleged in the bill of complaint, and alleges that a new benevolent fund had been set up from which the pensioners are to be paid. It makes practically the same allegation as the bill of complaint regarding the attempt to settle for Fifteen Hundred Dollars ($1500) cash with each pensioner, and says (Record, page 22):

"* * * that monthly payments of $35.00 per month have been made or tendered up to date to all pensioners who have not accepted settlement, including complainant Ella E. Pinkston; * * *."

Then follow allegations which are of peculiar interest in view of petitioners' present claim that less than Three Thousand Dollars ($3000) is the subject of the controversy in this case. The answer (Record, page 22) proceeds:

"Defendants further say that the present value of the securities and cash on hand in the Widows' Pension Fund is approximately $270,000.00; that to consummate settlements with the 22 pensioners who have agreed to accept $1500 each will cost $33,000.00; that the consummation of said settlements will leave a balance in the fund of approximately $237,000.00 with 51 pensioners on the Pension Roll; that if the settlements are not consummated there is an average amount on hand to meet each claim of approximately $3700.00;

that if the 22 settlements are consummated there will be an average amount in the fund to meet each claim of about $4650.00 and that the consummation of the 22 settlements already negotiated will enhance the value of the fund on hand about $100,000.00 and enhance the average amount on hand for the remaining claims about $950.00 each.

"Defendants further say that both the present value of each claim and the amount on hand to meet the claim of each pensioner on the Pension Roll is greatly in excess of $1500; * * *"

The answer then alleges facts intended to show that there had been no dissipation or diversion of the fund and no improper actions by the officials.

The controversy thus made up by the pleadings was whether or not defendants had administered properly the trust fund of Two Hundred Seventy Thousand Dollars ($270,000) and whether complainant-respondent was entitled to an accounting of the fund and to have the fund administered under orders of the Court by a receiver appointed by the Court. It is not denied by the answer or otherwise disputed in the record that complainant-respondent was entitled to all the Thirty-five Dollar ($35) monthly payments then accrued.

Notwithstanding that the petitioners had failed in their answer or otherwise to raise any jurisdictional question, the District Court, of its own initiation, after hearing the case on its merits, ruled that the amount in controversy was less than Three Thousand Dollars ($3000), and thereupon dismissed the case for want of jurisdiction, without passing on the merits and notwithstanding that the evidence was conclusive that the present value of respondent's claim was in excess of Five Thousand Dollars ($5000).

Petitioners' statement (page 4 of their petition) that

"the court found as a fact that the matter in controversy does not exceed the sum of $3,000.00"

is misleading unless it is understood that the District Court's decision was one of law; that is, that on the admitted facts the amount in controversy was not based on complainant's expectancy or on the amount of the trust fund sought to be administered by the Court, but on the unpaid payments of Thirty-five Dollars ($35) per month as accrued at the time of the commencement of the suit. *The right to those payments, however, was not denied and was not the subject of the real controversy, as above pointed out.*

This ruling was reversed by the Court of Appeals. Its opinion appears on page 131 of the record, and is set forth in full in the appendix to this brief.

ARGUMENT.

The question before this Court may be stated as follows:

A complainant having a pension certificate providing payments of Thirty-five Dollars ($35) per month, of which there was then unpaid less than Three Thousand Dollars ($3000), but having a life expectancy of twenty-six (26) years, whereby the present value of her claim is in excess of Five Thousand Dollars ($5000), sues in equity for an injunction, accounting and receivership in respect of a trust fund in which her own individual interest is Four Thousand Six Hundred Fifty Dollars ($4650) and which aggregated Two Hundred Seventy Thousand Dollars ($270,000). The right to the Thirty-five Dollar ($35) monthly payment is not in controversy. Is the amount in controversy in excess of Three Thousand Dollars ($3000)?

Whether or not the lower courts properly ignored the fact that the real controversy was as to an accounting and receivership of a trust fund of Two Hundred Seventy Thousand Dollars ($270,000) in which complainant-respondent's

individual interest was Four Thousand Six Hundred Fifty Dollars ($4650), we believe that the Court of Appeals was right in holding that the case was controlled by *Thompson vs. Thompson,* 226 U. S. 551. That case has never been reversed by this Court and stands as its authoritative pronouncement on the question sought to be raised herein.

The question there came up under an act establishing a Court of Appeals for the District of Columbia, which permitted a review of any final judgment or decree of that court

> "in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of $5,000.00."

A wife brought a suit for maintenance against her husband in the said court of the District of Columbia, which awarded her a decree requiring her husband to pay her $75 per month. The question raised in the Supreme Court was whether or not the amount in controversy exceeded the sum of $5,000, even though the payments due were less than $5,000.

On this point the opinion by Justice Pitney says (page 559):

> "Under the decree of the Supreme Court the payments of $75 per month for the support of the wife and child were to commence on July 15, 1909. Supposing that decree to be now reinstated by a reversal of the decree of the Court of Appeals, the installments already accrued would amount to considerably more than one-half of the jurisdictional amount. The expectancy of life of the parties is clearly sufficient to make up the balance."

The opinion then proceeds (bottom page 559) as follows:

> "The statutory maintenance is thus assimilated to alimony, *in that it is subject to be modified from time to time or even cut off entirely, in the event of a change in the circumstances of the parties; and it of course ceases wholly upon the death of the husband.*

See *Lynde v. Lynde,* 181 U. S. 183; *Audubon v. Shufeldt,* 181 U. S. 575, 578; *Lynde v. Lynde,* 64 N. J. Eq. 736, 751.

"Nevertheless, such a decree clearly and finally settles the obligation of the husband to contribute to the support of the wife and offspring, and fixes the amount of contributions required for the present to fulfill that obligation. *The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased or even cut off, as just indicated.*

"The statute conferring jurisdiction on this court, while requiring that the matter in dispute shall exceed five thousand dollars, *does not require that it shall be of such a nature as to constitute (if the event be favorable) a technical debt of record.* In *Smith v. Whitney,* 116 U. S. 167, 173, the matter in dispute was stated to be 'whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service, and depriving him of a salary, as paymaster general during the residue of his term as such, and as pay inspector afterwards, which in less than two years would exceed the sum of five thousand dollars.' This court sustained the appellate jurisdiction. That case has been repeatedly cited upon the present point, *Smith v. Adams,* 130 U. S. 167, 175; *South Carolina v. Seymour,* 153 U. S. 353, 358; *Simon v. House,* 46 Fed. Rep. 317, 318, *Chesapeake & Delaware Canal Co. v. Gring,* 159 Fed. Rep. 662, 664; and its authority upholds our jurisdiction in the case before us." (Italics ours.)

Petitioners seek to distinguish the *Thompson* case on the ground that the future payments under consideration there were "fixed" by the Court's decree. They were, however, no more "fixed" than the Thirty-five Dollars ($35) a month claimed by respondent in the principal case. In the *Thompson* case, as stated by Mr. Justice Pitney, the amount payable under the decree was subject to be modified or cut off entirely in the event of a change in the cir-

cumstances of the parties (referring apparently to remarriage) or in the event of the death of the husband. In the principal case the annuity was subject also to be cut off in the case of remarriage or death. We can see no possible distinction in principle between the question passed upon by this Court in the *Thompson* case and that now before it in the instant case. We cannot conceive how the decision of the Court of Appeals herein can be reversed without overruling the *Thompson* case.

The case of *Elgin vs. Marshall*, 106 U. S. 578, relied on by petitioners, came up under a statute which limited the jurisdiction of this Court to review final judgments and decrees to those cases in which the matter in dispute, exclusive of costs, exceeded the sum of Five Thousand Dollars ($5,000). The plaintiff having recovered a judgment of $1,660.75 upon certain bonds and coupons, claimed that the matter in dispute exceeded $5,000 because the decision constituted an estoppel *as to other actions* which might be brought on bonds and coupons of the same issue, as they fell due.

It needs no argument that such a case is altogether unlike the principal case, or the *Thompson* case.

The case of *Wright vs. Mutual Life Insurance Co. of New York*, 19 Fed. (2) 117, briefly affirmed by this Court in 276 U. S. 602, also relied on by petitioners, was one in which the plaintiff sued at law to recover certain installments due on an insurance policy. Judgment was awarded for $1136.54. It was held by the Court of Appeals that the jurisdictional amount was not involved, even though the judgment would be an estoppel as *against future actions* for further installments.

In both of these cases, the actions were at law seeking a recovery for less than the jurisdictional amount. In the principal case, however, the complainant-respondent, hav-

ing a claim of the present value of Five Thousand Dollars ($5,000), sought to engage the strong arm of equity to take over the administration of a Fund in which her individual interest was Four Thousand Six Hundred Fifty Dollars ($4650), and which amounted in all to many times the jurisdictional amount.

The 5th Circuit Court of Appeals, which decided the case of *Wright vs. Mutual Life Insurance Co. of New York, supra,* afterwards decided the case of *New York Life Insurance Co. vs. Swift,* 38 Fed. (2) 175. The latter case was a suit in equity to cancel certain insurance policies exceeding $3,000 in face value. The District Court dismissed the action apparently on the ground that the amount involved was to be measured by the loan, cash surrender, or paid-up value of the policies, which in fact, at the time when the suit was brought, amounted to nothing at all. In reversing the District Court's decision, the Court of Appeals distinguished the *Wright* case, on the ground that the latter was a law case in which the amount sought to be recovered was less than the jurisdictional amount, whereas the case then before it was an equity case in which the subject matter consisted of the insurance policies. The Court of Appeals said (p. 176):

> "In a suit to prevent a future loss or damage to the plaintiff, the object to be gained by the bill is the test of the jurisdictional amount; in other words, the value of the right to be protected. If that exceeds $3,000, the District Court has jurisdiction *regardless of the amount of damage that has presently accrued. Scott v. Donald,* 165 U. S. 107, 17 S. Ct. 262, 41 L. Ed. 648; *McNeill v. Southern Railway Co.,* 202 U. S. 543, 26 S. Ct. 722, 50 L. Ed. 1142; *Hunt v. New York Cotton Exchange,* 205 U. S. 322, 27 S. Ct. 529, 51 L. Ed. 821; *Bitterman v. L. & N. R. R. Co.,* 207 U. S. 205, 28 S. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; *Berryman v. Board of Trustees of Whitman College,* 222 U. S. 334, 32 S. Ct.

147, 56 L. Ed. 225. It is true none of these cases deals with life insurance policies, but the principle announced is applicable to all contracts." (Italics ours.)

If the District Court, instead of dismissing the principal case, had decided the case on the merits in favor of the complainant-respondent, it would have issued a decree requiring the appointment of a receiver of a large fund in which the complainant-respondent's individual interest was Four Thousand Six Hundred Fifty Dollars ($4650) or would have enjoined disbursements therefrom except under court order, and would have ordered an accounting of the Fund as respects the alleged wrongful transactions of the defendants-petitioners. The decree also would no doubt have provided that the complainant-respondent should be paid all installments then or thereafter due, but that would have been only incidental to the main provisions of the decree. That did not constitute the relief which was sought by the bill of complaint. Her right to that payment was not denied by the answer and was not the real subject of controversy. The issues raised by the pleadings constituted the real subject of controversy, which was whether or not there had been a misappropriation of trust funds in excess of the jurisdictional amount, and whether the complainant-respondent was entitled to have an accounting and receiver of those funds and an injunction against their use except as approved by the Court. In other words, the real controversy was whether or not the Brotherhood could put an end to the Fund, divert it to other uses than the pensions which it was designed to provide for and compel present settlements of pension claims at far below their present values. What the complainant-respondent was seeking was protection of her right to future payments. That right was worth in excess of Five Thousand Dollars ($5000). The Fund which she asked the court to administer amounted at least to Two Hundred

Seventy Thousand Dollars ($270,000). Her individual share in that Fund amounted to Four Thousand Six Hundred Fifty Dollars ($4650). How then can it be established that the controversy involved less than Three Thousand Dollars ($3000)?

Law cases in which no such equitable relief is prayed for and in which a judgment is asked for an amount considerably less than the jurisdictional amount can have little bearing upon the controversy under consideration here.

An equity case such as this is on all fours with the well-known case of *Berryman vs. Board of Trustees of Whitman College,* 222 U. S. 334. The action there considered arose upon a bill in equity to enjoin the levying of taxes upon the College. The amount of the tax then claimed by the taxing authorities to be due was less than the jurisdictional amount of $2,000. It was held (first paragraph of the syllabus) that

> "The amount in controversy where the question is whether a contract of exemption from taxation has been impaired by subsequent legislation is measured by the value of the right to be protected and not by a mere isolated element, such as the tax for a single year."

The opinion by Chief Justice White is in part as follows (p. 345):

> "The taxing officers of the county of Walla Walla, the defendants below and appellants here, insist that we may not review the merits, because the court below had no jurisdiction over the cause, and therefore we must reverse and remand, with directions to dismiss the bill. This rests upon the proposition that as the tax was below the jurisdictional amount, it afforded no basis for jurisdiction. The sum of the levied tax, it is urged, could not be increased by considering the power of taxation which might be exerted

in other taxing districts, or by adding taxes which, if the right to tax existed, might be assessed and levied in future years. This, it is insisted, is not only sustained by reason, but is sanctioned by prior decisions of this court.

"Both assumptions are wrong. The first, because it misconceives the character of the relief prayed, which was the enforcement of a contract exemption during the perpetual life of the corporation and as broad as its power to acquire and hold property.

"Considering the averments of the bill, the amount and value of the property of the corporation, and the nature and character of the contract of exemption asserted, it cannot be doubted that the value of the thing in issue, the contract right, exceeded in value the jurisdictional amount * * *."

In numerous other cases this Court has announced the same principle, for example, in *McNeill vs. Southern Ry. Co.*, 202 U. S. 543, and *Scott vs. Donald*, 165 U. S. 107.

For all of these reasons we believe that the decision of the Court of Appeals was right, and that there have been presented no sufficient reasons within the rules of this Court for a review here of that decision.

Respectfully submitted,

JAMES R. GARFIELD,
Solicitor for Respondent.

W. L. BRYAN,
1401 William-Oliver Bldg.,
Atlanta, Georgia,

GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,
1401 Midland Building,
Cleveland, Ohio,
Of Counsel.

APPENDIX.

OPINION OF COURT OF APPEALS.

(Filed March 8, 1934.)

Before MOORMAN, HICKS and HICKENLOOPER, Circuit Judges.

MOORMAN, Circuit Judge: Appellant, a resident of the State of Georgia, is the holder of a widow's pension certificate issued by the Brotherhood of Locomotive Firemen and Enginemen which entitles her, provided she does not remarry, to receive $35 a month during her lifetime from the funds of the Widow's Pension Department of the Brotherhood. In its convention held in June and July of 1931, the Brotherhood voted to discontinue the Widow's Pension Department, and directed its officers to make lump-sum settlements with all matured certificate holders at a sum not in excess of $1500 each, and further, to erase from the pension rolls the names of all those refusing to accept such settlements, and thereafter to distribute the residue of the funds then on hand among members of the department holding unmatured certificates. Notice of this action on the part of the Brotherhood was given to the appellant. The payment due September 1, 1931, under her certificate was not made, and she thereupon filed this bill against the Brotherhood and its executive officers, all residents of the State of Ohio, asking for an injunction restraining the disbursement of the funds of the department except as authorized by the constitution of the Brotherhood and the matured pension certificates, and that a receiver be appointed. The court granted a temporary injunction but refused to appoint a receiver. On final hearing the temporary injunction was dissolved and the bill was dismissed for want of jurisdiction on the ground that the matter in controversy did not exceed the sum or value of $3000.

In our opinion, the matter in controversy is not the accumulated pension fund nor the combined claims of all holders of matured certificates (*Lion Bonding Co. v. Karatz,* 262 U. S. 77, 85), but is the rights which appellant seeks to have protected, that is, her rights under the certificate which she holds. *Wisconsin Electric Co. v. Dumore Co.*, 35 Fed. (2d) 555, 556 (6 C. C. A.). This certificate binds the appellee to make monthly payments to appellant so long as she lives, provided she does not remarry, and in determining the value of her right to these payments it is permissible to take into consideration the probable duration of her life. The evidence shows that the normal expectancy of her life is 27.61 years, and that the present worth of her pension rights for that period is over $5000. The trial court held that the contract stipulation that the payments were to cease upon the appellant's remarriage as well as upon her death made the present value of these rights speculative and therefore prevented any computation thereof from being taken into account in determining the amount in controversy.

We think *Thompson v. Thompson,* 226 U. S. 551, is controlling. In that case the Supreme Court of the District of Columbia in a separate maintenance suit directed the husband to pay $500 for counsel fees and $75 a month for maintenance of a wife and child. The Court of Appeals of the District reversed the decree and the wife appealed to the Supreme Court of the United States, where the husband contended that the court lacked jurisdiction because it could hear only causes in which the matter in dispute, exclusive of costs, exceeded the sum of five thousand dollars. At the time the case was decided the accrued payments did not amount to the necessary $5000, but the court held that, considering the expectancy of the lives of the parties, the prospective payments were sufficient to make up the deficiency. In denying that the claim of these

payments was contingent the court said: The decree "clearly and finally settles the obligation of the husband to contribute to the support of the wife and offspring, and fixes the amount of contributions required for the present to fulfill that obligation. The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased or even cut off, as just indicated."

Appellees contend that the *Thompson* case is distinguishable from the case at bar in that in that case the payments could only be stopped by an order of court, whereas here they are to terminate automatically upon appellant's remarriage. It is generally held that remarriage is a sufficient ground to modify an alimony or maintenance award, and that being true, there is no distinction between future payments decreed in such a case and those claimed under contract such as the case at bar, for the wife's volition to remarry is the basis in either case of the change in obligation. We think the reasoning of the *Thompson* case is applicable to the present situation, and that the present worth of the future pension payments is not to be deemed so contingent or speculative as to prevent its being taken into account in determining the value of the matter in controversy, although such payments may be entirely cut off by the appellant's remarriage.

The failure of the appellant to file a narrative form of testimony in the District Court within the time allowed by Rule 38 of that court does not prevent our consideration of the testimony. *Alliance Securities Co. v. Killits*, 67 Fed. (2d) 480 (6 C. C. A.). Nor has the controversy here become moot. It is true that it was stated for appellant on the oral argument that she had no objection to settlements being made with other certificate holders, but she never waived her right to object to the threatened discontinuance of the payments to her according to the cer-

tificate which she holds, and appellees' promise to continue them cannot be accepted as nullifying the action taken by the Brotherhood in convention.

The decree below is reversed and the cause remanded for further proceedings.*

---

* Judge Hickenlooper participated in the conference decision, but this opinion was not prepared until after his death.

FILE COPY

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 32.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA and ALBERT PHILLIPS,
Petitioners,

vs.

ELLA E. PINKSTON,
Respondent.

BRIEF OF RESPONDENT.

JAMES R. GARFIELD,
Solicitor for Respondent.

W. L. BRYAN,
1401 William-Oliver Bldg.,
Atlanta, Georgia.

GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,
1401 Midland Building,
Cleveland, Ohio,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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Petitioners,

vs.

ELLA E. PINKSTON,
Respondent.

BRIEF OF RESPONDENT.

STATEMENT OF CASE.

Petitioners and respondent stand in a reverse position to that occupied in the Trial Court.

Respondent, a citizen and resident of the State of Georgia, brought the action in the United States District Court for the Northern District of Ohio, Eastern Division, against the Brotherhood of Locomotive Firemen & Enginemen and its three executive officers, as defendants.

The Brotherhood is an unincorporated voluntary association, having its main office and headquarters at Cleveland, in the State of Ohio. Its members are locomotive firemen and enginemen. This occupation has been deemed a hazardous occupation, and therefore its insurance benefits are not subject to control by the Department of Insurance of the State of Ohio.

On January 1, 1926, a Department of the Association, known as the Widows' Pension Department, was organized. Its object was to provide a monthly income for widows, or widowed mothers of deceased members.

The Department was made self-sustaining and entirely separate from all other departments of the Association. There was an express stipulation to this effect in the certificates of insurance which it issued (R. 66) and in the Constitution and By-laws (R. 75).

The Association had no capital stock, and its assets consist solely of the funds accumulated from assessments made on its members.

The Association agreed that upon the death of a member it would pay to his widow, or other designated beneficiary a pension of $35.00 per month **during her lifetime**, provided she did not remarry.

Monthly assessments in stated sums were agreed upon, but it was further agreed that should the regular sums be insufficient to meet the demands upon the Department, the officers would have authority to levy additional assessments to meet the deficiency (R. 77-78).

It developed that the rates charged by the Association were hopelessly inadequate, and the Association having become alarmed by the condition of its affairs employed an actuary to make a study of the Department, prior to the 1931 Convention (R. 60). A report on the affairs of the Department was made to the General Convention held in

June and July of 1931 (R. 78). In this report it was stated that the present value of the widows' claims could be determined if the average ages of the widows were known; that the committee knew the proportion who would remarry, and that such information was available from the records of the Pension Fund. Accordingly, the "present value" of the pensions due on the matured claims was shown to be $327,079, while the assets of the Department were worth only $313,762. The committee reported that the Department was actuarially insolvent, and that such insolvency would become more apparent if it continued operation.

The committee advised (R. 82) as follows:

> "(1) That the department should be abolished.
>
> "(2) That the assets of the department should be distributed to the members.
>
> "(3) That the method of distribution be to accumulate the assessments paid by each member at 4 per cent per annum, compounded annually, to obtain the total of these assessments and interest, and to return to each member a proportion of his total, equal to the proportion which the present assets of the department bears to the grand total of assessments and interest.
>
> "(4) That members who desire to provide their widows with a monthly income on death, do so by taking out a Mutual Insurance Department certificate, payable in monthly installments at death, as explained in the Mutual Insurance Department section of our report."

The following amendment to the report was proposed (R. 73):

> "That the International President and General Secretary and Treasurer be instructed **to make a lump**

sum settlement, not to exceed $1,500.00 for each widow now on the pension roll. Widows that refuse to settle will have their names erased from the Pension Roll."

The report as amended was adopted (R. 83).

Pursuant to the action of the Convention, the General Secretary and Treasurer of the Brotherhood, on July 30, 1931, wrote a letter advising each widow of the action of the Convention. He stated that the Convention had found it necessary to discontinue the said Widows' Pension Department; that the income from the same would not be sufficient to meet the liabilities. See letter to Mrs. Ella E. Pinkston, dated July 30, 1931 (R. 68), from which we quote as follows:

> "the officers of the Brotherhood have decided to send out checks in the usual way as of August 1st, though the action of the Convention terminates such payments thereafter."

The next monthly installment was due September 1, 1931. This payment was not made.

The matter was taken up by plaintiff through her attorneys, who went to Cleveland, Ohio, for a personal interview with the officers of the Association. Plaintiff's counsel were informed by the general counsel for the Brotherhood that the officers intended to carry out the directions given them by the Convention (R. 63). No mention was made of any alleged interpretation by the President of the Brotherhood in any way modifying the action of the Convention.

Complainant filed her bill of complaint on the 29th of September, 1931, on behalf of herself and all other beneficiaries similarly situated.

Complainant alleged that the funds of the department

were trust funds in which the beneficiaries held a prior claim; that the officers of the Brotherhood, who had been appointed as trustees of the said fund, were about to execute the expressed intention of the Convention to distribute the said funds among the living members and thereby place the assets beyond the reach of the complainant and all others similarly situated; that she was entitled as a matter of equity to have an accounting made by the Trustees and to have the Court take charge of the affairs of the department, fix the priorities of the matured claims and require a proper liquidation and administration of the department's funds (R. 1).

The bill first came on for hearing on the application for a temporary restraining order in the appointment of a Receiver.

In the course of the hearing the question of jurisdiction was raised by the defendants, and the Court held that the jurisdictional amount was involved.

In the order which was entered (R. 8) the Court found:

> "1. That the Widows' Pension Department was insolvent.
>
> "2. That no proper provision had been made for the payment of the holders of matured certificates who did not agree to accept the proposed settlements.
>
> "3. That the officers of the Brotherhood were about to comply with the action of the Convention and to make distribution of the fund contrary to the terms of the Constitution and By-Laws of the Brotherhood.
>
> "4. That the widows who refused to accept the proposed settlements were about to have their names erased from the pension roll.
>
> "5. That a temporary injunction should be granted against the Brotherhood and its officers restraining them from making disbursements from the said fund

except in the manner authorized by the Constitution and the terms of the Pension Certificates."

The Court having announced at the interlocutory hearing that the letter which was mailed on the 30th day of July, 1931 (R. 68), failed to advise the beneficiaries of their rights, new letters were prepared with the approval of the Court and mailed by the defendant to each of the beneficiaries. Copies of such letters are before the Court as defendant's Exhibit D (R. 86), Exhibit E (R. 88) and Exhibit F (R. 91).

A total of eighty-four widows were on the Pension Roll at the time the Court action was instituted. As a result of the letters, five of the sixteen with whom the settlements had been consummated returned their checks, and out of the fifty others who had previously agreed to accept the settlements, only twenty-two were willing to proceed with the settlements. This left fifty-one who refused the settlement.

The defendants then filed a motion to dismiss the bill of complaint upon the grounds of misjoinder and failure to state a valid cause of action in equity (R. 10), and the Court overruled such motion.

The cause subsequently came on for a final hearing. The answer (R. 13) admits that the fund in question, amounting to Two Hundred Seventy Thousand Dollars ($270,000), was held by the Brotherhood separately and apart from its other funds, admits the action of the Brotherhood in abolishing the Department virtually as alleged in the bill of complaint, and alleges that a new benevolent fund had been set up from which the pensioners are to be paid. It makes practically the same allegation as the bill of complaint regarding the attempt to settle for Fifteen Hundred Dollars ($1500) cash with each pensioner, and says (R. 17):

> "* * * that monthly payments of $35.00 per month have been made or tendered up to date to all pensioners who have not accepted settlement, including complainant Ella E. Pinkston: * * *."

Then follow allegations which are of peculiar interest in view of petitioners' present claim that less than Three Thousand Dollars ($3,000) is the subject of the controversy in this case. The answer (R. 18) proceeds:

> "Defendants further say that the present value of the securities and cash on hand in the Widows' Pension Fund is approximately $270,000.00; that to consummate settlements with twenty-two pensioners who have agreed to accept $1,500.00 each will cost $33,000.00; that the consummation of said settlements will leave a balance in the fund of approximately $237,000.00 with fifty-one pensioners on the Pension Roll; that if the settlements are not consummated there is an average amount on hand to meet each claim of approximately $3,700.00; that if the twenty-two settlements are consummated there will be an average amount in the fund to meet each claim of about $4,650.00 and that the consummation of the twenty-two settlements already negotiated will enhance the value of the fund on hand about $100,000.00 and enhance the average amount on hand for the remaining claims about $950.00 each.
>
> "Defendants further say that both the present value of each claim and the amount on hand to meet the claim of each pensioner on the Pension Roll is greatly in excess of $1,500.00; * * *."

The answer then alleges facts intended to show that there had been no dissipation or diversion of the fund and no improper actions by the officials.

The controversy thus made up by the pleadings was whether or not the defendants had administered properly

the trust fund of Two Hundred Seventy Thousand Dollars ($270,000) and whether complainant-respondent was entitled to an accounting of the fund and to have the fund administered under orders of the Court by a receiver appointed by the Court. It is not denied by the answer or otherwise disputed in the record that complainant-respondent was entitled to all the Thirty-five Dollar ($35) monthly payments then accrued.

In the course of the opening statement of counsel for the defendants the following colloquy took place between the Court and counsel (R. 26):

> "Mr. Stevenson: The plaintiff should show that the court has jurisdiction, in that it comes within the $3,000 in bringing it to this court. There is only one plaintiff.
>
> The Court: Well, the Court has passed on that question.
>
> Mr. Stevenson: The jurisdictional matter?
>
> The Court: Necessarily, in refusing to dismiss the bill.
>
> Mr. Stevenson: We didn't raise it.
>
> The Court: It raises itself."

Notwithstanding that the petitioners had failed in their answer or otherwise in the pleadings to raise any jurisdictional question, the District Court, of its own initiative, after hearing the case on its merits, ruled that the amount in controversy was less than Three Thousand Dollars ($3,000), and thereupon dismissed the case for want of jurisdiction, without passing on the merits, and notwithstanding that the evidence was conclusive that the present value of respondent's claim was in excess of Five Thousand Dollars ($5,000).

Petitioners-defendants' statement (page 4 of their petition for certiorari) that "the court found as a fact that the matter in controversy does not exceed the sum of $3,000,"

is misleading unless it is understood that the District Court's decision was one of law; that is, that on the admitted facts the amount in controversy was not based on complainant's expectancy or on the amount of the trust fund sought to be administered by the Court, but on the unpaid payments of Thirty-five Dollars ($35) per month as accrued at the time of the commencement of the suit. The right to those payments, however, was not denied and was not the subject of the real controversy, as above pointed out.

The ruling of the Trial Court was reversed by the Court of Appeals. This opinion is reported in 69 Fed. (2) 600.

Petitioners in their brief at page 5 refer to a petition for rehearing filed by them in the Circuit Court of Appeals (R. 116). They state that certain matter in regard to the settlements is disclosed by an affidavit filed by one of the officers of the Brotherhood, and that the affidavit also discloses that the remaining widows who have not made settlements are being paid monthly benefits in accordance with the terms of the certificates which they hold.

Respondent does not discuss this motion, for the reason that it raises matter outside the record. If the matter contained in the motion were properly in the record, respondent is in position to answer the motion.

THEORY OF RESPONDENT-PLAINTIFF'S CASE.

1. The funds of an Association composed of members upon whom assessments are made for the purpose of paying benefits for the widows of a deceased member, and not conducted for profit, are trust funds.

2. A court of Equity has jurisdiction to preserve and protect such trust funds, and to enjoin any threatened misapplication of the same.

3. Each member or beneficiary has the right in her own behalf and in behalf of all others similarly situated to institute proceedings for the purpose of securing a decree of specific performance requiring the Trustees to control and administer the funds according to the organic plan of the Association, and enjoining any wrongful administration or misapplication of such funds.

4. Each beneficiary or member has the right to insist on the use of the property in accordance with the Constitution and By-Laws of the Association and in accordance with the terms and stipulations of the certificates issued by the Association.

5. If such an Association becomes insolvent and is in such financial condition that it cannot be safely continued, then a Court of Equity should take charge of its assets and see that the same are properly distributed.

6. In the event of such liquidation by a Court of Equity, claims which have matured by reason of the death of a member have a preference over unmatured claims in the distribution of the assets of such Association, and any beneficiary of such matured claim has a right in her own behalf and in behalf of all others similarly situated to have a Court of Equity enter a decree fixing and establishing such priority.

7. In such actions and for jurisdictional purposes, the value of the matter in dispute may be determined by the value of the rights to be protected, or by the amount of the fund.

QUESTION.

The plaintiff holds a pension certificate providing for payments of $35.00 per month. Payments were in default at the time of the filing of the bill. The complainant had been advised that all other payments would be suspended. There were then unpaid less than $3,000, but complainant had a life expectancy of twenty-six years, and the net present value of her claim is in excess of $5,000. She sues in equity for an injunction, accounting and receivership in respect of the trust fund aggregating $270,000. Her individual interest in this fund is $4,650.00. The right to a continuation of the $35.00 payments per month is not in controversy. The payments cease upon the intervention of death or remarriage.

Under such circumstances is the amount in controversy in excess of $3,000.00?

ARGUMENT.

Whether or not the Lower Courts properly ignored the fact that the real controversy was as to an accounting and receivership of the trust fund of $270,000, in which plaintiff-respondent's actual interest was $4,650.00, we believe that the Court of Appeals was right in holding that the case was controlled by **Thompson v. Thompson, 226 U. S. 551.** That case has never been reversed by this Court, and stands as its authoritative pronouncement on the question sought to be raised herein.

The jurisdictional question arose in that case under an Act establishing a Court of Appeals for the District of Columbia, which permitted a review of any final judgment or decree of that Court in all causes in which the matter in dispute, exclusive of costs, should exceed the sum of $5,000.00.

A wife brought a suit for separate maintenance against her husband in the said Court of the District of Columbia, which awarded her a decree requiring her husband to pay her $75.00 per month. The question raised in the Supreme Court was whether or not the amount in controversy exceeded the sum of $5,000, even though the payments which had accrued were less than $5,000.

On this point the opinion by Justice Pitney says (page 559):

> "Under the decree of the Supreme Court the payments of $75.00 per month for the support of the wife and child were to commence on July 15, 1909. Supposing that decree to be now reinstated by a reversal of the decree of the Court of Appeals, the installments already accrued would amount to considerably more than one-half of the jurisdictional

amount. The expectancy of life of the parties is clearly sufficient to make up the balance."

The opinion then proceeds (bottom p. 559) as follows:

"The statutory maintenance is thus assimilated to alimony, in that it is subject to be modified from time to time or even cut off entirely, in the event of a change in the circumstances of the parties, and it, of course, ceases wholly upon the death of the husband. (See Lynde v. Lynde, 181 U. S. 183; Audubon v. Shufeldt, 181 U. S. 575; Lynde v. Lynde, 64 N. J. Eq. 736, 751.)

"Nevertheless, such a decree clearly and finally settles the obligation of the husband to contribute to the support of the wife and offspring, and fixes the amount of contributions required for the present to fulfill that obligation. The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased, or even cut off, as just indicated.

"The statute conferring jurisdiction on this court, while requiring that the matter in dispute shall exceed five thousand dollars, does not require that it shall be of such a nature as to constitute (if the event be favorable) a technical debt of record. In Smith v. Whitney, 116 U. S. 167, 173, the matter in dispute was stated to be 'whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service, and depriving him of a salary as paymaster general during the residue of his term as such, and as pay inspector afterwards, which in less than two years would exceed the sum of five thousand dollars.' This court sustained the appellate jurisdiction. That case has been repeatedly cited upon the present point (Smith v. Adams, 130 U. S. 167, 175; South Carolina v. Seymour, 153 U. S. 353, 358; Simon v. House, 46 Fed. Rep. 317, 318; Chesa-

peake & Delaware Canal Co. v. Gring, 159 Fed. Rep. 662, 664), and its authority upholds our jurisdiction in the case before us."

Petitioners seek to distinguish the Thompson case on the ground that the future payments under consideration were "fixed" by the Court's decree. They were, however, no more "fixed" than the $35.00 a month claimed by the respondent in this case. The rights of respondent had become "fixed" upon the death of her husband. She has a vested right to continue to collect the $35.00 a month payments as long as she lives. Nothing can intervene to defeat this right, except the dissipation of the fund.

The jurisdictional amount is tested by the status as it exists at the time the bill is filed. The fact that conditions may intervene in the future which will defeat the claim, or diminish its amount, does not defeat a present right to proceed in a Federal Court of Equity. If the amount involved when the suit is brought is sufficient to give a Federal Court jurisdiction, it does not lose such jurisdiction because subsequent events may reduce the amount.

A distinction is drawn by the Courts between law cases where a judgment is sought for a certain sum then alleged to be due on the one hand, and equity cases on the other where the object of the proceedings is the protection of the right which may not have accrued in its entirety, but is in large measure potential in its nature. This distinction is very clearly brought out in the case of **Western & Atlantic Railroad Company v. Railroad Commission, 261 U. S. 264, 67 Law. Ed. 645.** This case involved the right of the Railroad Commission to force the railroad to lay a certain sidetrack. It was contended by the Railroad Commission that the Federal jurisdictional amount

was not involved, in view of the fact that the cost of construction of the sidetrack would be only $1,266.24, and that the cost of maintenance was so indefinite as to amount and duration that the same could not be counted for the purpose of making up the jurisdictional amount. The District Court held, **275 Fed. 128**, "the cost in material and labor is stated in the petition to be but $1,260.00, and this amount alone is involved * * * the cost of future maintenance is not involved now because that is an incident of the future use. The maintenance cost for some years will be slight, and if the business done over the track does not justify its maintenance, the question of its abandonment will be open then." The Supreme Court overruled the District Court, and held that even though the maintenance cost might fluctuate during future years, and might be defeated altogether by a decision to abandon the track, yet that it was proper to take into consideration such future maintenance costs in calculating the amount involved for jurisdictional purposes in equity.

Likewise, in the case of **Berryman v. Board of Trustees of Whitman College, 222 U. S. 334**, the Supreme Court held that in a controversy which involved **the right** to levy a tax over a period of years, that the prospective amount of taxes which would probably be levied during the future might be taken into consideration in calculating the amount in controversy. The distinction was drawn between a bill to cancel a particular tax levy, and one which attacked the potential right to levy. In the first instance, the amount involved is the actual face amount of the levy. In the second place the amount involved is the value of the taxes which are likely to be levied during the future. Under such circumstances, the determination of the amount in controversy appears upon an analysis of the relief prayed for. In this case the Court held that "it cannot

be doubted that the value of the thing in issue, the contract right, exceeded in value the jurisdictional amount. Granting that the uncertainties of the future and the shifting ownership of property forbids, in a contest merely over the validity of a tax **adding the sum of future taxes which might be levied to the amount of taxes actually levied** for the purpose of jurisdiction, that principle can have no application to a case where the issue presented is not only the right to collect, but also to levy all future taxes."

While a District Court decision, yet a very clear expression of the principle of law involved is made in the case of **Mutual Life Insurance Co. v. Rose, 294 Fed. 122.** In this case a bill to cancel a life insurance policy which provided for double liability in the event of accidental death was under consideration. During the trial of the case it was urged that the insured had died of tuberculosis since the bringing of the suit, and, therefore, there was no possibility of the contingency of accidental death intervening. The Court held, however, that there was a possibility of it happening when the suit was brought, and, therefore, the jurisdictional amount was involved, because jurisdiction appears on the situation which existed at the time the suit is brought and not on what may happen in the future.

In the present case the complainant has a vested right to collect $35.00 per month as long as she elects to remain single. It is within her power to elect to remain single. Conversely, she may or may not marry. The ability to marry is contingent upon the intervention of an additional element, that is, the consent of the second party to the marriage contract. We submit that for jurisdictional purposes the amount in controversy is tested by the present potential right, and is not to be defeated by the thought

that some condition subsequent may intervene in the future which will diminish the present prospective recovery.

This distinction between law cases and equity cases is clearly brought out by comparing the case of **Wright v. Mutual Life Insurance Co., C. C. A. 5, 19 Fed. (2) 117,** same case, **276 U. S. 602,** cited by petitioners in their brief at page 16, and the later decision by the same Circuit Court of Appeals in the case of **New York Life Insurance Co. v. Swift, C. C. A. 5, 38 Fed. (2) 175.** The Swift case was a suit in equity to cancel an insurance policy, and the Court held that the jurisdictional amount was governed by the potential liability, and not by the accrued cash surrender value. The Court said, in a suit to prevent a future loss or damage to the plaintiff, the object to be gained by the bill is the test of the jurisdictional amount. In other words, the value of the right to be protected. If that exceeds $3,000.00, the District Court has jurisdiction regardless of the amount of damage that has presently accrued. In reference to the Wright case, the Circuit Court of Appeals said:

> "That case is easily distinguishable from the case at bar (Swift case), for there the policy had matured and was payable in installments. The suit was brought by the beneficiary in a state Court for recovery of the monthly installments then due, amounting to only $420.00."

Likewise, on page 16 of their brief, counsel for petitioners cite the following cases:

La Vecchia v. Conn. Mutual Life Ins. Co. of Hartford, Conn., 1 Fed. Supp. 588;

Wyll v. Pacific Mutual Life Ins. Co. of Calif., 3 Fed. Supp. 483;

Kithcart v. Metropolitan Life Ins. Co.; Kevan v. John Hancock Mutual Life Ins. Co., 1 Fed. Supp. 719;

Reliance Life Ins. Co. v. Capital National Bank, 38 Ga. App. Rep. 349, 143 S. E. 924;

Guardian Life Insurance Co. v. Johnson, 186 Ark. 1019, 57 S. W. (2d) 555;

Fields v. Equitable Life Ins. Co., 199 N. Car. 454, 154 S. E. 738.

Each of these cases are law cases in which a judgment was prayed for the recovery of a certain sum.

In the instant case, as in the Swift case, supra, the respondent is not suing at law, and is not asserting a claim against the petitioners for the amount of any accrued monthly payments. She is asking for no money judgment against the defendants, but is in a Court of Equity (probably the only Court to which she has recourse) asking that her vested rights as a beneficiary in the trust funds of an insolvent Association be protected and preserved by order of Court.

If the District Court, instead of dismissing respondent's case, had decided it on the merits in favor of the plaintiff-respondent, it would have issued a decree requiring the appointment of a Receiver of the large fund of which the complainant-respondent's individual interest was $4,650.00, or would have enjoined disbursements therefrom, except under Court order, and would have ordered an accounting of the fund as respects the alleged wrongful transactions of the defendants-petitioners. The decree also would no doubt have provided that the complainant should be paid the installments then, or thereafter, due, but that would have been only incidental to the main provisions of the decree. That did not constitute the relief which was sought by the bill of complaint. Her right to a continuation of

the payments was not denied by the answer, and was not really the subject of the controversy. The real controversy was whether or not the Brotherhood could arbitrarily put an end to the fund, fix a certain sum as a compromise of complainant's claim, and decide, in the event that she and others similarly situated refused to accept said proffer, that their names would be stricken from the Pension Roll, and their rights abrogated. What the complainant was seeking was protection to her potential right to the future payments.

Therefore, law cases in which no such equitable relief is prayed, and in which a judgment is asked for in an amount less than the jurisdictional sum, can have little bearing upon the controversy under consideration.

Petitioners rely upon the case of Dunbar v. Dunbar, 190 U. S. 340, 47 Law. Ed. 1084. The question involved in that case is whether or not a claim for alimony is of such a character as can be provable in bankruptcy, that is, could a judgment be rendered fixing a definite sum then due in extinguishment of the alimony claim? The Court held that under the requirements of the Bankruptcy Act of the United States this could not be done.

Opposing counsel have not only overlooked the fact that the Dunbar case is thus distinguished from the Thompson case, but have also seemingly overlooked the fact that the actuarial testimony related not only to what complainant-respondent would in fact receive in the future, but also related to the present value of the rights or expectancy in question. In the report of the committee of the Association to its Convention (R. 78), the potential claims of the widows were as a matter of fact reduced to "their present value." The committee reported that it had considered the contingencies to which the widows' rights were subject. We quote from the report as follows:

"The 'present value' can be determined if we know the average ages of widows corresponding to the ages at the death of members, and we know the proportion of widows who remarry. This information is available from the records of Pension Funds. For example, if we know that the average age of the widows of members who die at age 40, is 36, then the value of the benefit in event of death at 40 is the present value of a pension of $420 per annum on the life of a woman aged 36, **taking into account the chances of remarriage**. The benefit has a definite 'lump sum' value on the death of the member" (R. 78).

Likewise Arthur Pipe the defendants'-petitioners' actuary testified (R. 60) that respondent's right, subject to the contingencies involved herein, had a present value of approximately $6,000.00. He testified that in making his study of the fund he contemplated the contingency of remarriage as well as the contingency of death; that sufficient records have now been established through various Pension Departments that from such statistical data the probability of remarriage can now be actuarily determined.

Further, in the letters which were mailed out by the Brotherhood to the widows, it was conceded that the liability of the Department was measured by the present value of the rights of the beneficiaries.

The Rule in Injunction Cases

On the jurisdictional question it is held that the rule applicable to injunctive actions generally should be applied to this action. This action is in part one for an injunction. Complainant-respondent is asking that the funds be preserved. She asks that the defendants be en-

joined from carrying out their avowed intention of disbursing the funds.

In injunction actions it has been invariably held that the test of jurisdiction is not the damage which the plaintiff has already sustained, but is the value to the plaintiff of the right which he asserts, and for which he prays protection. This rule is laid down in Foster on Federal Practice, Volume 1, Section 13, as follows:

> "In a suit for an injunction, the value of the matter in dispute is that of the object of the bill, namely, the value to the plaintiff of the right for which he prays protection; or the value, to the defendant, of the acts of which the plaintiff prays prevention; together with the amount of the damages which the plaintiff claims that he has already sustained and prays to have awarded to him. It is not limited by the amount of damages claimed by plaintiff to have already accrued. It has been held that the amount of such damages cannot be considered nor added to the value of the right sought to be protected."

Countless cases are cited in the text in support of such statement. Among other cases so holding are the following:

> Smith v. Whitney, 116 U. S. 167 (Quoted in the Thompson case);
> Bitterman v. L. & N. Railroad Company, 207 U. S. 205;
> Hunt v. New York Cotton Exchange, 205 U. S. 322.

The Circuit Court of Appeals for the Sixth Circuit applied this rule in the case of Wisconsin Electric Company v. Dumore Company, 35 Fed. (2) 555, in which, as stated in the first paragraph of the syllabus, it was held:

> "Federal Court's jurisdiction of suit to enjoin un-

fair competition depends, not alone on pecuniary damage resulting from acts complained of, but also on value of rights which plaintiff asks to have protected."

Under such rule it is unnecessary to go beyond the testimony of defendants' witness Pipe to sustain jurisdiction in the instant case. He testified that the present value of complainant's right in the fund approximated $6,000.00 (R. 62). It is that right which complainant-respondent asked to have protected in this action.

As to Jurisdiction Being Tested by the Amount of the Fund.

Respondent asks that a trust be declared in and of the Widows Pension Fund and that such fund, now admittedly insolvent, be administered under order of the court. The fund so referred to approximates $300,000.00 in value, and it is submitted that the jurisdiction herein might be sustained on such ground alone.

The funds of a mutual benefit society are merely held by it in trust. The beneficiary holds the equitable interest in such funds, and this right can only be determined by a bill in equity (19 R. C. L., page 1319, paragraph 106).

An association composed of members upon whom assessments are made for the purpose of paying death benefits is in the nature of a trust, and a court of equity has jurisdiction to protect the trust fund.

Dill et al. v. Supreme Lodge, 226 Federal Reporter 807;

Stamm v. North Western Mutual Beneficial Association, 65 Michigan, page 317, 32 N. W. 710, Text 716.

It has been held in many cases brought for the administration of a trust fund that the amount of the fund or property to be administered determines the question of jurisdiction. It was so held in the case of Handley v. Stutz, 137 U. S. 366, in which the court said:

> "The trust fund so administered and ordered to be distributed by the Circuit Court amounting to much more than $5,000.00, the Appellate jurisdiction of this court is not affected by the fact that the amounts decreed to some of the creditors are less than that sum."

One of the leading cases on this point is that of Jones v. Mutual Fidelity Company (C. C. Del.), 123 Fed. 506, and other cases so holding are the cases of—

Putnam v. Timothy Dry Goods & Carpet Company (C. C. Tenn.), 79 Federal 454;
Kelly v. Graphite Company (D. C. Ala.), 34 Federal (2d), page 791;
Conway v. Bank & Trust Company (C. C. Ky.), 185 Federal 950;
Hotel Company v. Wade, 97 U. S., page 20;
Towle v. American Building Loan Investment Society, 60 Federal 131 (C. C. Ill.);
King v. Kansas City Police Relief Assoc., 60 Fed. (2d) 547 (D. C. Missouri);
Local No. 7 v. Bowen et al., 278 Fed. 271 (D. C. Texas).

In such cases it is not a matter of aggregating the claims of the various parties interested in the fund. The decisions proceed on the theory that where a trust fund is the subject of the action and the court's jurisdiction is invoked by one having a beneficial interest in such fund, the jurisdiction is properly tested by the amount of the fund rather than by the amount of plaintiff's claim.

Petitioners at Page 10 of their brief have referred to the case of Eberhard v. North Western Mutual Life Insurance Company, 241 Fed. 353.

In that case the defendant was a **solvent** insurance company and each of the plaintiffs was a party who separately and individually had contracted with the defendant corporation. The rights of the plaintiffs were measured by their several contracts and the relationship of each of the plaintiffs to the defendant was that of two contracting parties and not that of trustee and beneficiary. There was no community of interest between the various plaintiffs and the case would seem clearly distinguishable on such ground. In its opinion the court said:

> "It cannot be doubted that such rights as each policyholder has depend upon his contract with the insurance company and are measured by its terms. The policy is an agreement to pay its holder a computable sum of money upon certain conditions. **His interest does not depend upon, and is not related to the interest of any other policyholder similarly situated** * * *. The sole matter in dispute is between the defendant and each complainant as to the amount the latter shall recover. Each policyholder has no demand upon any other; his demand is against the defendant alone, and what he may receive from the defendant can in no way affect the claims of others. The policyholders' claims to the fund are several, and not joint, and the amount payable to each depends upon his contract alone. Under these circumstances the separate claims cannot be aggregated for the purpose of making a case within the jurisdiction. The test to be applied will be found in a number of cases."

In the instant case neither Complainant nor the other beneficiaries have contracts enforceable at law. The sole

relationship between defendants and the beneficiaries is that of trustee and beneficiary. The beneficiaries' claims are based upon one and the same trust agreement, i. e., the Constitution of the Brotherhood as in force when their rights arose. The only claim of Complainant and other beneficiaries is against the trust fund, and their only right is the right to the proper administration of that fund. That the beneficiaries have a common and undivided right and interest in the fund cannot be questioned, and the Eberhard case, in which aggregation of claims was necessary to confer jurisdiction, would seem clearly distinguishable. The distinction would seem to be pointed out by the court in the portion of its opinion above quoted.

Similarly, in the case of Lyon Bonding Company v. Karatz, 262 U. S. 77, and as pointed out in the first paragraph of the syllabus, the Complainant was a simple contract creditor. There again there was no community of interest or title between the several claimants, and the court, at page 86 of its opinion, says:

> "Nor is it (this action) like those cases in which several plaintiffs, having a common undivided interest, unite to enforce a single title or right, and in which it is enough that their interests collectively equal the jurisdictional amount."

SUMMARY.

Respondent, as a cestui que trust, holds a beneficial interest in the assets of a Mutual Benefit Society. These assets have uniformly been construed to be trust funds. Respondent's claim matured and became vested upon the death of her husband. This right continues, unless defeated by the intervention of some condition subsequent.

It was the express purpose and intent of the Brotherhood to fix an arbitrary sum for settlement of this vested right. If respondent refused to accept this arbitrary sum, then the Brotherhood proposed to cut off this present right and leave her without recourse, except in the courts. The penalty for clinging to the provision made for her by her deceased husband was that she should be stricken from the Pension Roll.

This case does not involve merely the right to a present judgment for the accrued monthly payments, but brings in issue the right of protection to all of the future payments to which respondent is now entitled. The amount in controversy for jurisdictional purposes is the value of this right, as it now exists.

Respectfully submitted,

JAS. R. GARFIELD,
Solicitor for Respondent.

W. L. BRYAN,
GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,
Of Counsel.

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CHARLES ELMORE CR

In the Supreme Court of the United States

OCTOBER TERM, 1934.

No. 32.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,

Petitioners,

vs.

ELLA E. PINKSTON,

Respondent.

PETITION FOR REHEARING.

THOS. STEVENSON,
Guarantee Title Bldg.,
Cleveland, Ohio,
Counsel for Petitioners.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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In the Supreme Court of the United States

OCTOBER TERM, 1934.

No. 32.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,

Petitioners,

vs.

ELLA E. PINKSTON,

Respondent.

PETITION FOR REHEARING.

Come now the above named Petitioners and respectfully represent to this Honorable Court that on the 5th day of November, 1934, an opinion was rendered and order made affirming the decree of the Court below in favor of the Respondent, (Copy thereof is attached hereto as Appendix); that, subsequent to the filing of the Briefs in this case, other decisions of this Court bearing upon the question involved and at variance with the opinion of the Court rendered in the instant case, were brought to the notice of counsel and do not appear in the Briefs herein; that the opinion of the Court rendered herein suggests a misapprehension of the somewhat complicated facts which were not discussed by the Petitioners as the sole question in issue was one of jurisdictional amount and that it would be inequitable to permit the order to stand as entered as it is in conflict with other decisions of this Court.

QUESTION IN THE CASE.

Although the issue in this case was stated to be:—

> "Where a complainant (widow) 40 years of age, with a life expectancy of 26 years, is the holder of a Pension Certificate providing payment of Thirty Five Dollars ($35.00) per month for life, providing she does not remarry (payment to cease if she remarries), may such future contingent payments be reckoned during life expectancy in order to confer jurisdiction on the federal court."

the real question upon which the answer to the foregoing issue depends is:—

> "IS IT POSSIBLE TO ESTIMATE THE CHANCES OF THE HAPPENING OF AN EVENT WHICH MAY NEVER OCCUR?"

If it is possible to estimate the chances of the happening of an event which may never occur then the value of future payments contingent upon such an event can be calculated but, conversely, if it is not possible to estimate the chances of the happening of an event which may never occur, we respectfully submit it is not possible to calculate the value of future payments contingent upon such an event, for any purpose.

It is well settled by decisions of this Court that jurisdictional amount must clearly appear, that the presumption is against Federal jurisdiction and that, by virtue of Sec. 37 Jud. Code; 28 U. S. C. A. Sec. 80; 36 Stat. 1098, if at any time it shall appear to the trial court the jurisdictional amount is not involved, it is the duty of that court to dismiss the case. If, as a matter of law, it clearly appears from the allegations of the petition that the jurisdictional amount is not involved, it is the duty of the trial court to dismiss the case.

There is no dispute as to the issue in the case at bar. The matter in controversy, upon the value of which Federal jurisdiction depends, is stated by this Court to be "the value of respondent's own interest in the fund." Obviously, Respondent's interest depends upon her certificate. Payments under her certificate terminate if she remarries. This contingency squarely raises the question "To acquire the requisite jurisdictional amount, can the chances of the respondent remarrying be estimated in like manner as the chances of death where payments are fixed for life?"

The problem of arriving at the value of future payments predicated upon similar contingencies for other purposes has been before this Court several times. An identical situation was before this Court in 1903 in the case of *Dunbar v. Dunbar,* 190 U. S. 340.

As we understand the decisions, the primary question of making the calculation is one of mathematics or logic and not a question of law. This would seem to be made quite clear by the comments of this Court in the *Dunbar* case, *supra.* At page 345 this Court said:

> "But how can any calculation be made in regard to the continuance of widowhood when there are *no tables* and *no statistics* by which to calculate such contingency? How can a valuation of a probable continuance of widowhood be made? Who can say what the probability of remarrying is in regard to any particular widow? We know what some of the factors might be in the question: inclination, age, health, property, attractiveness, children. These would, at least, enter into the question as to the probability of continuance of widowhood, *and yet there are no statistics which can be gathered which would tend in the slightest degree to aid in the solving of the question.*" (Italics ours.)

In further discussion this Court said, page 346:

> "Taking the liability as presented by the contract, if the mortality tables were referred to for the

> purpose of ascertaining the value so far as it depended upon life, the answer would be no answer to the other contingency of the continuance of widowhood; and if, having found the value as depending upon the mortality tables, you desire to deduct from that the valuation of the other contingency, *it is pure guesswork to do it.*" (Italics ours.)

We humbly submit that the contingency in the case at bar is identical with the contingency in the *Dunbar* case. In that case this Court practically stated it to be axiomatic that it is impossible to calculate such a contingency for any purpose by stating:

> "There are no statistics which *can* be gathered which would tend in the slightest degree to aid in the solving of the question."

Thompson v. Thompson, 226 U. S. 551, was decided by this Court in 1913, about 10 years after the *Dunbar* case. Although the contingency in the case at bar is identical with the contingency in the *Dunbar* case the Court, in its opinion herein of November 5th, after discussing the *Thompson* case and the case at bar said:—"the situation there and that here fairly cannot be distinguished." Nevertheless, may we humbly point out there was the same distinction between the *Dunbar* case and the *Thompson* case as there is between the *Thompson* case and the case at bar. This Honorable Court recognized the distinction between the *Dunbar* and *Thompson* cases and applied a different rule in the *Thompson* case to what had been applied in the *Dunbar* case after holding as a "*fact*" that the payments were not contingent. Did not that holding of "fact" clearly distinguish the cases?

In the *Thompson* case, as pointed out by this Honorable Court, Mr. Justice Pitney said, page 560:

> "The future payments are *not in any proper sense contingent or speculative,* although they are subject

to be increased, decreased or even cut off, as just indicated." (Italics ours.)

In the *Thompson* case, this Court pointed out and held that the future payments were "fixed" and not contingent or speculative. In the case at bar we humbly submit the future payments are admittedly contingent as they automatically terminate upon remarriage. Does not the holding of "fact" make a clear distinction between the *Thompson* and the instant cases?

In its opinion of November 5th in the case at bar this Court also says:

> "The occurrence of the specified event which would put an end to the obligation is no more uncertain in the one case than in the other."

It must be conceded that the happening or occurrence of the specified event is no more uncertain but we respectfully submit the "effect" of the happening or occurrence of the specified event is entirely different. In the case at bar the mere occurrence of the specified event "automatically" and at once puts an end to future payments. In the *Thompson* case, however, the occurrence or happening of any event would not *ipso facto* affect the future payments in the slightest degree but would only form the basis of an argument why the court having jurisdiction should consider a modification. It might well be that the Court having jurisdiction would not consider any changed circumstances sufficient to justify any modification of the order in which event, the happening of the occurrence would be ineffective.

In the case at bar, the happening of only one event, remarriage, will affect the future payments and that will *ipso facto* terminate them. In the *Thompson* case many changes in the circumstances might justify an application to the court for a modification of the order, though none would *ipso facto* affect the payments in the slightest degree.

We respectfully suggest that even remarriage of a divorced wife is not invariably accepted by the court as a reason for discharging a divorced husband from alimony payments. The acquisition of independent means by a divorced wife is not necessarily sufficient to excuse the divorced husband from payment of alimony. As above suggested, the change in circumstances merely furnishes a "reason" for asking the court to modify the order fixing the payments of alimony. No change in circumstances, in and of itself, affects the order in any manner. Furthermore, no application may ever be made for a change in the order.

In the *Thompson* case, and in cases of similar character, four (4) things must occur before the payments fixed by the Order are disturbed or the status created by the Order interfered with in any way. (1) There must be a change in circumstances, (2) An application must be made to the Court for a modification of the Order, (3) The change must be such as to satisfy the Court a change should be made, and (4) The Court must make the necessary Decree changing the Order. A Court would not move of its own motion and none of the first three items or any combination of them would, of their own force, affect the existing status in the slightest degree. On the contrary, in the case at bar, the single act by the Respondent herself would automatically destroy the existing status and absolutely and finally terminate payments.

During oral argument of this case Mr. Justice Brandeis directed attention to the case of *Humes v. United States*, 276 U. S. 487. This case, involving a similar contingency, deals with succession taxes. We had failed to find the case and consequently it does not appear in our former briefs.

In the *Humes* case, a large sum of money was directed by will to be given to charity in the event of death without issue of a designated female child before age 40. The Executors of the estate contended the chances of the child

dying without issue before age 40 could be estimated and that therefore a certain portion of the estate should be exempt from succession taxes. Obviously, the child might die before age 40 without issue but quite as obviously it is an event which might never occur. In that aspect it is identical with the case at bar where the Respondent may remarry yet it is an event which may never occur. The *Humes* case squarely presented for determination the question:—

> "Is it possible to estimate the chances of the happening of an event which may never occur?"

The case was decided by this Court in 1928. That was 25 years after the decision in the *Dunbar* case and 15 years after the decision in the *Thompson* case. It is interesting to note, however, that the Solicitor General who briefed the case for the government and therefore had the negative of the question as opposing the claimed exemption, did not cite the *Dunbar* case, nor is it referred to by opposing counsel or in the opinion of the Court. To all intents and purposes, therefore, this was again decided as a case of first impression.

We here respectfully point out that, in the trial in the *Humes* case, actuaries testified as to the chances of the happening of the event and also introduced certain prepared tables. Notwithstanding such testimony this Court, by Mr. Justice Brandeis said, page 493:—

> "If all the facts stated had been embodied in findings, no legal basis would be laid for the deduction claimed."

After discussing the narrow basis upon which the actuarial testimony was founded this Court also said, page 494:—

> "Obviously, the calculation that the contingent interest of the charities was equal to 4.0909 per cent of the residue was *mere speculation, bearing the delusive appearance of accuracy.*" (Italics ours.)

In denying exemption from taxation this Court, in the closing paragraph, used the following significant language:—

> "One may guess, or gamble on, or even insure against, any future event. The Solicitor general tells us that Lloyds of London will insure against having twins. But the fundamental question in the case at bar is not whether this contingent interest can be insured against, or its value guessed at, but what construction shall be given to a statute. Did Congress, in providing for the determination of the net estate taxable, intend that a deduction should be made for a contingency *the actual value of which cannot be determined from any known data?* Neither taxpayer, nor revenue officer,—*even if equipped with all the aid which the actuarial art can supply,*—could do more than *guess* at the value of this contingency. It is clear that Congress did not intend that a deduction should be made for a contingent gift of that character." (Italics ours.)

Although neither the *Dunbar* case nor the *Humes* case were before the District Court in the case at bar, that Court, in consideration of the question presented, arrived at the same conclusion as announced by this Honorable Court in those two cases. Even though actuaries testified and introduced tables in the *Humes* case, as in the case at bar, this Court stated it to be axiomatic that:

> "Neither taxpayer, nor revenue officer,—even if equipped with all the aid which the actuarial art can supply,—could do more than guess at the value of this contingency."

Had his language been brought to the notice of the District Court in the case at bar we humbly submit he would have been bound thereby and could have done no other than dismiss the case. Had it been brought to the notice of the Circuit Court of Appeals it is inconceivable that Court would have reversed the District Court. In both the

Dunbar case and in the *Humes* case this Court plainly held that nothing better than a guess can be made at the value of the contingencies.

Following the *Humes* case we find a still later decision by this Honorable Court in which the effect of the removal of the contingency, by positive and uncontradicted evidence, is considered. This case also was not in our prior briefs nor brought to the notice of this Court on oral argument. *United States v. Providence Trust Company,* 291 U. S. 272. This case was decided February 5th, 1934, the opinion of the Court being delivered by Mr. Justice Sutherland.

In that case there was another claim for deduction from succession taxes predicated upon a charitable bequest which was contingent upon the death of a woman without issue. It was the position of the government there is an irrebutable presumption that a woman may always have issue, that the chance of her dying without issue cannot be calculated and that the situation was controlled by the decision of this Court in the *Humes* case.

The facts in the case were that the daughter of the deceased, who was to die without issue before the charitable bequest would become operative, was a woman 50 years of age, she had been in poor health and under a physician's care, that prior to the death of the testator the daughter had undergone an operation for the removal of certain organs which, in the light of present knowledge, rendered her incapable of becoming pregnant or giving birth to a child. This Court held the stated contingency had been absolutely removed and that the bequest would certainly go to charity upon the death of the daughter.

In arriving at its conclusion this Court said, page 286:

> "The sole question to be considered is—What is the value of the interest to be saved from the tax? That is a *practical question,* not concluded by the presumption invoked but to be determined by ascer-

taining in terms of money what the property constituting that interest would bring in the market, subject to such uncertainty as ordinarily attaches to such an inquiry. See *Ithaca Trust Co. v. United States*, 279 U. S. 151, 73 L. ed. 647, 49 S. Ct. 291, *supra*. Thus stated, the birth of a child to the daughter of the deceased after his death was so plainly impossible that, *as a practical matter*, the hazard disappears from the problem. Certainly, in the light of our present accurate knowledge in respect of the subject, if the interest had been offered for sale in the open market during the daughter's lifetime, a suggestion of the possibility of such an event would have been ignored by every intelligent bidder as utterly destitute of reason." (Italics ours.)

This Court therein stated this to be a practical question, (not a question of law) and laid down this test—

> "What is the value of the interest to be saved from the tax?"

The Court then points out that, as a practical matter, the birth of a child had become impossible and that hazard had disappeared from the problem. The Court then says:

> "If the interest had been offered for sale in the open market during the daughter's lifetime, a suggestion of the possibility of such an event would have been ignored by every intelligent bidder as utterly destitute of reason."

May we presume to apply the same test to the interest of the Respondent in the case at bar? If her interest under her certificate, which is defeated upon her remarriage, were offered for sale in the open market, who could be found to make a bid for her interest? Her interest is terminated by remarriage. Even an agreement in writing by her to not remarry, in order to encourage a sale, would not be binding upon her but would be void as against public policy.

In the case last discussed there is a clear and logical holding by this Court that the hazard or contingency had

been removed as a matter of fact and therefore the bequest to the charity was unconditional, to become operative on the death of the daughter. The problem of calculating the chances of the daughter having issue disappeared from the case. May we suggest that a similar situation would arise in the case at bar in the event of a widow becoming incurably insane. Under such circumstances she would be incapable of consummating a contract of marriage. The hazard of remarriage would thereupon disappear from the value of her claim and it would be calculated upon her life expectancy. Only under such circumstances, however, can any actual value be placed on a certificate conditioned as in the case at bar.

In its opinion herein, after expressing the opinion that the value of Respondent's own interest in the fund exceeds the jurisdictional amount this Court says:—

> "This, it will be seen, is not an action at law to recover overdue instalments, but a suit in equity to preserve and protect a right to future participation in the fund. If the value of that right exceeds $3,000, the district court has jurisdiction."

This statement appears to suggest, and it will doubtless be seized upon to support a contention, that there is a difference in the matter of estimating the value of the matter in controversy between a suit in equity and an action at law. No difference is indicated in Sec. 24 of the Judicial Code, 28 U. S. C. A. Sec. 41, nor are we aware of any decision of this or any other court suggesting any such distinction. On the other hand, it has been held that the limitation of the jurisdiction to cases involving $3,000 or more applies to suits in equity as well as to actions at law.

If future contingent payments throughout the life expectancy may be reckoned for the purposes of federal jurisdiction in the case at bar, would it not follow, by the same

reasoning, that federal jurisdiction would be present if the Respondent had elected to bring an action at law. This Court says:

> "Continuance of payments during the life of the Respondent is fixed by contract quite as definitely as continuance of payments for maintenance in the *Thompson* case was fixed by decree, and subject to substantially like conditions subsequent."

This statement would appear to indicate that the Respondent is the holder of a contract and we suggest that, when the things and matters occurred of which she complained she had the right to elect to either bring an action at law on the theory of a breach of her contract or to bring the suit now before the court. The question naturally arises "If respondent had elected to bring an action at law for damages for alleged breach of her contract, would the future payments, conditioned as herein admitted, support federal jurisdiction of such a suit?

This Court held in the *Humes* case that the chances of the happening of a contingency such as is present in the case at bar cannot be estimated even with the aid of all the actuarial art. The *Thompson* case was an exception, where this Court held there was no contingency. We have been unable to find the *Thompson* case has been followed. May we presume to make a brief critical discussion of the decision in the *Thompson* case? Except for the fact this Court held the payments provided by the Court order in that case to be "fixed," could it not well be held that the payments therein were conditional and contingent? It is a theory of the law that all contracts are entered into in contemplation of existing statutes. Such statutes are a part of every contract, by operation of law. Although the Court order granting alimony in the *Thompson* case was unconditional *by its terms*, as a matter of law it was always subject to the reserved power of the court to change the pay-

ments. This power to modify was as much a part of the court order as though written therein in express terms.

While it is true the power to modify existed at all times there is no presumption the court making the order would exercise it at any time. Until the power to modify is invoked as above indicated and exercised, the status created was fixed and continuing. It was undoubtedly for that reason this Court held "the future payments *are not in any proper sense* contingent or speculative." Had the court order contained an express provision "should the plaintiff remarry the court will modify this order and payments shall terminate" it is difficult to conceive this Court would have held the payments were not contingent and speculative.

The doctrine announced and axiom recognized in the cases above discussed, except the *Thompson* case, have frequently been cited and followed by other federal and state courts.

Shanley v. Herold, 141 Fed. 423;
Herold v. Shanley, 146 Fed. 20;
In re Westmoreland, 4 Fed. (2d) 602;
Delaware Trust Company v. Hanley, 53 Fed. (2d) 1042.

In the case last cited a Testator set up five annuities and then gave the sum of $3,000.00 per year to the Vicar of a church, to be in addition to his present salary. This item contained a proviso that "if said salary should be reduced or discontinued after my decease, then payment of this annuity is to be suspended during such period of reduction or discontinuance."

The executor of the Will undertook to capitalize this annuity as a charitable exemption. The Court held the situation to be governed by the reasoning in the *Humes* case and denied the exemption.

On the other hand courts have frequently denied federal jurisdiction where future payments were predicated upon an uncertain and incalculable event, such as recovery from disability.

LaVecchia v. Conn. Mut. Life Ins. Co. of Hartford, Conn., 1 Fed. Supp. 588;

Wyll v. Pacific Mutual Life Ins. Co. of Calif., 3 Fed. Supp. 483;

Kithcart v. Metropolitan Life Ins. Co.: Kevan v. John Hancock Mutual Life Ins. Co., 1 Fed. Supp. 719;

Reliance Life Ins. Co. v. Capital National Bank, 38 Ga. App. Rep. 349; 143 S. E. 924;

Guardian Life Insurance Co. v. Johnson, 186 Ark. 1019; 57 S. W. (2d) 555;

Fields v. Equitable Life Ins. Co., 199 N. Car. 454; 154 S. E. 738.

IF IT BE HELD POSSIBLE TO ESTIMATE THE CHANCES OF THE HAPPENING OF AN EVENT WHICH MAY NEVER OCCUR AN ADDITIONAL PRESUMPTION OR ADDITIONAL ALLEGATIONS ARE NECESSARY TO SHOW JURISDICTIONAL AMOUNT.

Where future payments continue for life, the jurisdictional amount is arbitrarily arrived at by multiplying the payments by the life expectancy and finding the present value of the result. In a given case, even of payments to continue for life, if payments and life expectancy are small, the requisite jurisdictional amount may not appear.

Life expectancy itself is an arbitrary figure, based upon the experience of millions of *normal* lives. Mortality tables are not applicable in every case but only to cases of normally healthy people. The arbitrary average is imposed for practical reasons only and may well fail for any individual life. Experience has demonstrated, however,

that for millions of normal lives, mortality tables provide a practically correct average, though such tables are possible only because the ultimate contingency, death, is inevitable with every individual life. Purely for reasons of expediency, therefore, the figures appearing in recognized life experience tables are arbitrarily imposed.

With a contingency that may never occur, however, as in the case at bar, this Court held in the *Dunbar* case "there are no statistics which *can* be gathered which would tend in the slightest degree to aid in the solving of the problem." In the instant case, to secure the requisite jurisdictional amount, Respondent must establish that she will remain unmarried more than Eight (8) years. The question immediately arises, how that can be done? Surely her mere statement is not sufficient. It cannot be *presumed* that she will remain unmarried throughout her life expectancy nor for any other definite period of years. If, as stated by this Court "there are no tables and no statistics by which to calculate such contingency" and further "there are no statistics which *can* be gathered which would tend in the slightest degree to aid in the solving of the problem" it would almost appear that jurisdiction, as suggested by this Court "depends upon pure guesswork."

While the plaintiff may *allege* that the matter in controversy is of the value of $3,000.00, such allegation is not susceptible of proof under the holdings of this Court that the contingency cannot be valued. By force of the same holdings of this Court the allegation cannot be disproved. In the *Thompson* case this Court held that future payments were "fixed" and "not in any proper sense contingent or speculative" therefore future payments could be reckoned for the life expectancy. The present holding of the Court "that the question of jurisdiction here under consideration is the same in substance as that involved in the *Thompson* case" appears to lead to the inevitable conclusion the

Court holds the future payments herein to be "fixed" and "not in any proper sense contingent or speculative," despite the clear provision that payments terminate if Respondent remarries.

We respectfully submit there was a failure on the part of counsel to make a full presentation, both in briefs and on oral argument, in two aspects. First there was practically no discussion of the facts for the reason that only the legal question of the jurisdictional amount was in issue and second having found a decision of this Court apparently squarely in point, *Dunbar v. Dunbar,* we decided to rely upon authority and refrained from presenting an argument on points which appeared to have been determined and settled. In addition to the foregoing, other decisions were brought to our notice which our best efforts had failed to discover and these decisions were therefore not discussed in our Briefs.

The failure to analyze and discuss the facts in the Briefs may have resulted in a misconception of the actual facts as they appear of record. In its statement of the facts contained in the opinion of the Court it is stated:

> "Widows refusing to settle were to have their names erased from the roll, and be provisionally relegated to another fund. Payment of monthly installments on pensions was discontinued, beginning September 1st, 1931."

If the last statement of fact means that the Respondent and other widows who refused to settle actually had their names erased from the roll and that they have not received any monthly installments or pensions since September 1st, 1931, there is a misapprehension of the facts as they appear in the Record. The record shows (R. 122) the Respondent and the other widows who have refused to settle (a total of 5 widows) had been paid monthly benefits in accordance with the terms of their certificates up to the time of the de-

cision in the Circuit Court of Appeals. There was merely a failure to make the payment falling due on September 1st, 1931 but the payment was subsequently made and accepted by each widow including Respondent.

The fact that this Court has repeatedly recognized, stated and demonstrated the impossibility of calculating the value of a contingency, as in the case at bar, was not adequately presented to the Court. The result is a decision which appears to be at variance with other decisions involving the same problem. Ignoring altogether the interests of the present litigants, we humbly submit to this Court that the entire public has a superior and paramount interest in the logical development of the law and that the greater public interest should not be jeopardized or sacrificed by the ineptitude, incompetence or error of counsel in the presentation of a case.

WHEREFORE, the Petitioners humbly pray that a Rehearing may be granted herein and that the holding and order herein be reviewed and reversed.

THOS. STEVENSON,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I do hereby certify that I prepared and have examined the foregoing Petition for rehearing, that in my opinion such Petition is well founded and should be granted by this Honorable Court and that said Petition is presented in good faith and not for delay.

Dated this 28th day of November, 1934.

THOS. STEVENSON,
Attorney for Petitioners.

APPENDIX.

SUPREME COURT OF THE UNITED STATES.

No. 32.—October Term, 1934.

Brotherhood of Locomotive Firemen and Enginemen, David B. Robertson Timothy Shea, and Albert Phillips, Petitioners, vs. Ella E. Pinkston.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 5, 1934.]

Mr. Justice Sutherland delivered the opinion of the Court.

The Brotherhood of Locomotive Firemen and Enginemen is an unincorporated voluntary association with headquarters in Ohio. It has a department known as the Widows' Pension Department, created in order to provide a monthly income for the widows or widowed mothers of deceased members. The widow of a member, upon his death, is to receive a pension of $35 per month during her lifetime. In the event of her remarriage, the pension is to cease. The respondent, widow of a deceased member, became entitled to this pension. Thereafter, the association, following an investigation of the financial condition of the department and upon an actuarial report, determined to abolish the department and distribute the assets after making a lump-sum settlement not to exceed $1500 with each widow then on the pension roll. Widows refusing to settle were to have their names erased from the roll, and be provisionally relegated to another fund. Payment of monthly instalments on pensions was discontinued, beginning September 1st, 1931.

Complainant thereupon brought suit in a federal district court, on behalf of herself and other beneficiaries similarly situated, for an accounting, determination of priorities, and a proper liquidation and administration of the funds of the department. The federal jurisdiction was invoked on the ground of diversity of citizenship. The district court, after a hearing, dismissed the bill on the ground that the requisite amount to confer jurisdiction (over $3,000) was not involved. The court of appeals reversed (69 F. (2d) 600) upon the authority of *Thompson v. Thompson*, 226 U. S. 551. Whether that court rightly held that the jurisdictional amount was involved is the only question for consideration.

The entire fund is nearly $300,000. The bill proceeds on the theory that this constitutes a trust fund, and seeks its administration under judicial orders. Respondent urges that the jurisdiction may well be tested by the value of the whole fund. But we put that question aside, since we are of opinion that the value of respondent's own interest in the fund exceeds the jurisdictional amount.

This, it will be seen, is not an action at law to recover overdue instalments, but a suit in equity to preserve and protect a right to future participation in the fund. If the value of that right exceeds $3,000, the district court has jurisdiction.

In the *Thompson* case, a decree had been entered by the Supreme Court of the District of Columbia in favor of a wife against her husband, for support and maintenance at the rate of $75 a month, together with $500 for counsel fees. The decree was reversed by the Court of Appeals of the District. On an appeal to this court, our jurisdiction was challenged upon the ground that a sum in excess of $5,000 was not involved, as the statute at that time required. While the instalments already accrued amounted to much less than that, it was held that the expectancy of

life of the parties was clearly sufficient to make up the balance, and jurisdiction was upheld. Mr. Justice Pitney, who delivered the opinion, said (p. 560)—"The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased or even cut off, as just indicated."

The situation there and that here fairly cannot be distinguished. The life expectancy of respondent, as shown by the mortality tables, is enough to bring the value of the future pension instalments, as of the date of the suit, to a sum much in excess of $3,000; and as to that no point is made. The jurisdictional defect said to exist is that the payments are to cease in the event of respondent's remarriage; and this condition, petitioners say, makes future payments depend entirely upon the volition of the widow, and whether they may accrue is, therefore, a matter of pure speculation. Indeed, the happening of the event does not depend (if that would matter) upon the widow's volition alone, but equally upon the willingness of another to marry her. Continuance of payments during the life of the respondent is fixed by contract quite as definitely as continuance of payments for maintenance in the *Thompson* case was fixed by decree, and subject to substantially like conditions subsequent. In the *Thompson* case the payments were subject to be cut off entirely, not only by death but, the court said, "in the event of a change in the circumstances of the parties." The same is true here. In no respect are we able to see any difference in principle between the two cases. The occurrence of the specified event which would put an end to the obligation is no more uncertain in the one case than in the other.

Moreover, the evidence discloses that the expectancy of remarriage and its effect upon the value of the pension is capable of actuarial determination. The law of averages applies in respect of that event, as it does in respect of

death and of other events. Mr. Pipe, an actuary called as a witness by petitioners, testified that the value of respondent's right to receive $35 a month so long as she remained unmarried was, in round figures, $6,000 as of August 1, 1931. A report made to the Brotherhood, filed June 2, 1932, by its Committee on Constitution, which seems to have been made after careful study, contains the statement:

> "The 'present value' can be determined if we know the average ages of widows corresponding to the ages at the death of members, and we know the proportion of widows who remarry. This information is available from the records of Pension Funds. For example, if we know that the average age of the widows of members who die at age 40, is 36, then the value of the benefit in event of death at 40, is the present value of a pension of $420 per annum on the life of a woman aged 36, taking into account the chances of remarriage. The benefit has a definite 'lump sum' value on the death of the member, * * *"

Counsel upon both sides have cited and discussed decisions of this and other courts bearing upon the general subject. We have examined these decisions, but find it unnecessary to review or distinguish them. We agree with the court below that the question of jurisdiction here under consideration is the same in substance as that involved in the *Thompson* case; and, that being so, the decree of the court below must be affirmed.

So ordered.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 32.—October Term, 1934.

Brotherhood of Locomotive Firemen and Enginemen, David B. Robertson Timothy Shea, and Albert Phillips, Petitioners,
vs.
Ella E. Pinkston.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 5, 1934.]

Mr. Justice Sutherland delivered the opinion of the Court.

The Brotherhood of Locomotive Firemen and Enginemen is an unincorporated voluntary association with headquarters in Ohio. It has a department known as the Widows' Pension Department, created in order to provide a monthly income for the widows or widowed mothers of deceased members. The widow of a member, upon his death, is to receive a pension of $35 per month during her lifetime. In the event of her remarriage, the pension is to cease. The respondent, widow of a deceased member, became entitled to this pension. Thereafter, the association, following an investigation of the financial condition of the department and upon an actuarial report, determined to abolish the department and distribute the assets after making a lump-sum settlement not to exceed $1500 with each widow then on the pension roll. Widows refusing to settle were to have their names erased from the roll, and be provisionally relegated to another fund. Payment of monthly instalments on pensions was discontinued, beginning September 1st, 1931.

Complainant thereupon brought suit in a federal district court, on behalf of herself and other beneficiaries similarly situated, for an accounting, determination of priorities, and a proper liquidation and administration of the funds of the department. The federal jurisdiction was invoked on the ground of diversity of citizenship. The district court, after a hearing, dismissed the bill on the ground that the requisite amount to confer jurisdiction (over

$3,000) was not involved. The court of appeals reversed (69 F. (2d) 600) upon the authority of *Thompson* v. *Thompson,* 226 U. S. 551. Whether that court rightly held that the jurisdictional amount was involved is the only question for consideration.

The entire fund is nearly $300,000. The bill proceeds on the theory that this constitutes a trust fund, and seeks its administration under judicial orders. Respondent urges that the jurisdiction may well be tested by the value of the whole fund. But we put that question aside, since we are of opinion that the value of respondent's own interest in the fund exceeds the jurisdictional amount.

This, it will be seen, is not an action at law to recover overdue instalments, but a suit in equity to preserve and protect a right to future participation in the fund. If the value of that right exceeds $3,000, the district court has jurisdiction.

In the *Thompson* case, a decree had been entered by the Supreme Court of the District of Columbia in favor of a wife against her husband, for support and maintenance at the rate of $75 a month, together with $500 for counsel fees. The decree was reversed by the Court of Appeals of the District. On an appeal to this court, our jurisdiction was challenged upon the ground that a sum in excess of $5,000 was not involved, as the statute at that time required. While the instalments already accrued amounted to much less than that, it was held that the expectancy of life of the parties was clearly sufficient to make up the balance, and jurisdiction was upheld. Mr. Justice Pitney, who delivered the opinion, said (p. 560)—"The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased or even cut off, as just indicated."

The situation there and that here fairly cannot be distinguished. The life expectancy of respondent, as shown by the mortality tables, is enough to bring the value of the future pension instalments, as of the date of the suit, to a sum much in excess of $3,000; and as to that no point is made. The jurisdictional defect said to exist is that the payments are to cease in the event of respondent's remarriage; and this condition, petitioners say, makes future payments depend entirely upon the volition of the widow, and whether they may accrue is, therefore, a matter of pure speculation. Indeed, the happening of the event does not depend (if that would matter)

upon the widow's volition alone, but equally upon the willingness of another to marry her. Continuance of payments during the life of the respondent is fixed by contract quite as definitely as continuance of payments for maintenance in the *Thompson* case was fixed by decree, and subject to substantially like conditions subsequent. In the *Thompson* case the payments were subject to be cut off entirely, not only by death but, the court said, "in the event of a change in the circumstances of the parties." The same is true here. In no respect are we able to see any difference in principle between the two cases. The occurrence of the specified event which would put an end to the obligation is no more uncertain in the one case than in the other.

Moreover, the evidence discloses that the expectancy of remarriage and its effect upon the value of the pension is capable of actuarial determination. The law of averages applies in respect of that event, as it does in respect of death and of other events. Mr. Pipe, an actuary called as a witness by petitioners, testified that the value of respondent's right to receive $35 a month so long as she remained unmarried was, in round figures, $6,000 as of August 1, 1931. A report made to the Brotherhood, filed June 2, 1932, by its Committee on Constitution, which seems to have been made after careful study, contains the statement:

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Counsel upon both sides have cited and discussed decisions of this and other courts bearing upon the general subject. We have examined these decisions, but find it unnecessary to review or distinguish them. We agree with the court below that the question of jurisdiction here under consideration is the same in substance as that involved in the *Thompson* case; and, that being so, the decree of the court below must be affirmed.

So ordered.